

THE
THIRD PART
OF THE
Institutes of the Laws of England ;
CONCERNING
HIGH TREASON,
AND OTHER PLEAS OF THE CROWN.
AND
CRIMINAL CAUSES.

ECCLES. viii. 11.

*Quia non profertur cito contra malos sententia, absque timore
ullo filii hominum perpetrant mala.*

Inertis est nescire quod sibi liceat.

AUTHORE EDUARDO COKE, MILITE, J. C.

HÆC EGO GRANDÆVUS POSUI TIBI, CANDIDE LECTOR.

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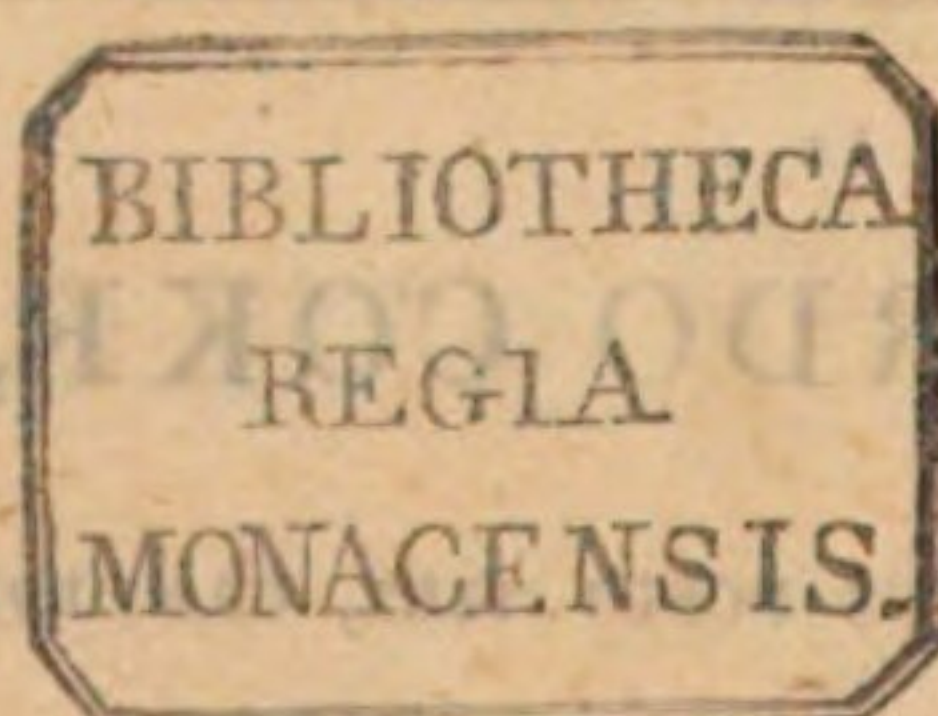
1817.

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THE
THIRD PART
OF THE
Sentences of the Law of England;

CONSTITUTED
HIGH TREASON
AND OTHER PLEAS OF THE CROWN
AND
CRIMINAL CAUSES.

Eccl. viii. 11.
Quia non profectus cito contra malos contentio, neque timore
ipso illis dominum persequentis mala.
Inest est nuncius quod nunc licet.



LONDON
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1817

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DEO,
PATRIÆ,
TIBI.

A PROEM

TO THE

THIRD PART *of the* INSTITUTES.

IN the Second Part of the Institutes we have spoken only of acts of parliament, (viz.) of Magna Carta, and many ancient and other acts of parliament, which we have explained, and therein observed which of them are declaratory of the ancient lawes of this realme, which are introductory of new, and which mixt: all of them (excepting a very few) concerning common pleas, and these two great pronouns, *meum* and *tuum*.

In this Third Part of the Institutes, we are to treat *de malo*, viz. of high treason, and other pleas of the crowne, and criminall causes, most of them by act of parliament, and some by the common law: in which cases the law of all other is most necessary to be knowne, because it concerneth the safety of his majestie, the quiet of the common-wealth, and the life, honour, fame, liberty, blood, wife, and posteritie of the party accused, besides the forfeiture of his lands, goods, and all that he hath: for it is truly said of these laws, *Reliquæ leges privatorum hominum commodis prospiciunt, hæ regiæ majestati, subditorum vitæ, ac publicæ tranquillitati consulunt*. And that in these cases the ancient maxime of the law principally holdeth, *Misera servitus est, ubi jus est vagum, aut incognitum*. And where some doth object
against

See the 1. part
of the Institutes
sect. 500.

*Malum non habet
efficientem, sed de-
ficientem causam.*
Evill hath not
an efficient, but
a deficient cause,
by reason of the
want of some
vertue or nota-
ble good.

Stamford.

A PROEME to the

against the lawes of England, that they are darke and hard to be understood, we have specially in these and other parts of the Institutes opened such windowes, and made them so lightsome, and easie to be understood, as he that hath but the light of nature, (which Solomon calleth the candle of Almighty God, Prov. 20. 27.) adding industrie and diligence thereunto, may easily discern the same. And that may be verified of these lawes, that *lex est lux*, Prov. 6. 23, the law itselfe is a light. See Rom. 2. 14. And when we consider how many acts of parliament (published in print) that have made new treasons and other capitall offences, are either repealed by generall or expresse words, or expired: how many indictments, attainders of treasons, felonies, and other crimes, which are not warrantable by law at this day: and how few book-cases there have been published of treasons, (though a subject of greatest importance) and those very slenderly reported: we in respect of the places which we have holden, and of our own observation, and by often conferences with the sages of the law in former times concerning criminall causes or pleas of the crowne, have thought good to publish this third part of the Institutes, wherein we follow that old and sure rule, *Quod judicandum est legibus, et non exemplis*. A worke arduous, and full of such difficultie, as none can either feele or beleieve, but he onely which maketh tryall of it. And albeit it did often terrifie me, yet could it not in the end make me desist from my purpose; (especially in this worke) so farre hath the love and honour of my country, to passe through all labours, doubts, and difficulties, prevailed with me.

This, as other parts of the Institutes, wee have set forth in our English tongue, not onely for the reasons in the preface to the first part of the Institutes alledged, which we presume may satisfie any indifferent and prudent reader: but specially this treatise of the pleas of the crowne, because, as it appeareth by that which hath been said, it concerneth all the subjects of the realme more neerly by many degrees, then any of the other.

Third Part of the Institutes.

man surnamed *Theologus magnus*, upon the second chapter of the book of Wisdom, in or about the 20. yeare of king E. 3. wrote to this effect. *Narrant historiæ quod cum Willielmus dux Normannorum regnum Angliæ conquississet, deliberavit quomodo linguam Saxoniam possit destruere, et Angliam, et Normanniam in idiomate accordari, et ideo ordinavit, quod nullus in curia regia placitaret nisi in Gallico, et iterum quod puer quilibet ponendus ad literas addisceret Gallicum, et per Gallicum Latinum, quæ duo usque hodie observantur. Hæc ille.* But the statute of 35 E. 3. cap. 15. made not long after Holcoth wrote, 35 E. 3. ca. 15. hath taken these edicts of a conqueror away, and given due honour to our English language, which is as copious and significant, and as able to expresse any thing in as few and apt words, as any other native language, that is spoken at this day. And (to speake what we think) we would derive from the Conqueror as little as we could.

When Henry the first died, all the issue male of the Conqueror, and of his sonnes were dead without issue male.

The wife of king H. 1. was Mawde daughter of Malcolme king of Scotland surnamed Canmor, and of Margaret his wife, who was the granchild of Edmond Ironside king of England, viz. the said king Edmond had issue Edward surnamed the Outlaw, because he lived a long time beyond sea with Salamon king of Hungary out of the extent of the lawes of this realme. Edward had issue the said Margaret his eldest daughter, famous for her piety and vertue; she had issue Mawde wife of king H. 1. who by her had issue Mawde, of whose English blood by Gefery Plantagenet earle of Anjou all the kings of England are lineally descended.

We have in this Third Part of the Institutes cited our ancient authors, and bookes of the law, viz. Bracton, Britton, the Mirror of Justices, Fleta, and many ancient records, never (that we know) before published, to this end, that seeing the pleas of the crown are for the most part grounded upon, or declared by
statute

A PROEME, &c.

statute lawes, the studious reader may be instructed what the common law was before the making of those statutes, whereby he shall know, whether the statutes were introductory of a new law, declaratory of the old, or mixt, and thereby perceive what was the reason and cause of the making of the same, which will greatly conduce to the true understanding thereof.

We shall first treat of the highest, and most hainous crime of high treason, *Crimen læsæ majestatis*; and of the rest in order, as they are greater and more odious then others.

C A P. I.
OF HIGH TREASON.

BY the statute of 25 E. 3. *de proditionibus*, is declared in 25 E. 3. cap. 2.
certaine particular cases, what offences shall be taken to
be treason, with this restriction, that if any other case sup-
posed to be treason should happen before any justices, the justices
should tarry without going to judgment of the treason, till the
case be shewed before the king and his parliament, whether it
ought to be adjudged treason or other felony: therefore we
will lay our foundation upon, and begin with that act of par-
liament, the letter whereof *in proprio idiomate* ensueth.

AVXINT pur ceo que divers opinions ount estre eins ceux
heures qen case doit estre dit treason (1), et en quel case
nemi, le roy a le request des seigniours et commons ad fait
declarifment (2) que ensuist. Cestassavoir, quant home (3) fait
compasser (4) ou imaginer (5) la mort (6) nostre seignior (7)
le roy (8), madame sa compaignie (9), ou de lour fitzeigne et
beire (10), ou si home violaist la compaignie le roy (11), ou leigne
file le roy nient marie (12), ou la compaignie leigne fitz (12)
et beire le roy. Ou si home leve guerre enconter nostre seignior
le roy (14) en son realme, ou soit aidant as enemies nostre dit
seignior le roy en son realme, donnant a eux aid, ou comfort en son
roialme, ou per aylours (15), et de ceo provablement soit atteint
de overt fact per gents de lour condition (16). Et si home coun-
terface le grand (17), ou privie seale le roy, ou sa monye (18).
Et si home apport faux money en cest roialme counterfait al
mony danglittere, sicome la mony appelle * Lusheburgh, ou auter
sembleble a la dit mony danglittere, sachant le money estre faux (19)
pur merchander ou payment faire en disceite nostre dit seignior le
roy et de son people. Et si home tuast chancellor, treasurer, ou
iustices nostre seignior le roy del un banke ou del auter, iustices
in eire et daffises, et tous auters iustices assignes de oier et
terminer †, esteaunts en lour places en fesants lour offices. Et soit
a entendre que les cases suisnoms doit estre adjudge treason, que
se extent a nostre seignior le roy et sa roiall majestie: Et de
tiel manner de treason la forfeiture des escheates appertenant a
nostre seignior le roy, cibien des terres et tenements tenus des auters,
come de luy mesme (20).

III. INST.

B

Item,

Divers opinions.
Ad fait declarifment.

Nota, This is a
law for the most
part declaratory,
but addeth also
divers things to
the ancient law.

* Lusheburghs,
alias Luxen-
burghs were a
kinde of base
coine to the
likenesse of our
English money,
so called, be-
cause they were
coined in Lushe-
burgh, which
sometime was an
earledome, and
after a duke-
dome. See Chau-
cer in the Pro-
logue to the
Monk's Tale,
the host speaking
to a lusty monk,
faith, God wot,
no Lusheburghes
pay ye, that is
(upon the cohe-
rence of the
verse) No pay-
ment make ye
that is not full
and currant.

† *Injuria illata
judici seu locum te-
nenti regis videtur
ipse regi illata,
maxime si fiat, in
exercente officium.*

Item, **W**HEREAS divers opinions have been before this time, in what case treason shall be said, and in what not; the king at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth: that is to say, when a man doth compassse or imagine the death of our lord the king, of my lady his queene, or of their eldest sonne and heire: or if a man doe violate the kings companion, or the kings eldest daughter unmarried, or the wife of the kings eldest sonne and heire: or if a man doe levie warre against our lord the king in his realme, or be adherent to the kings enemies in his realme, giving to them aide and comfort in the realme or elsewhere, and thereof be provably attainted of open deed by people of their condition. And if a man counterfeit the kings great or privie seale, or his money: and if a man bring false money into this realme counterfeit to the money of England, as the money called Lufheburgh, or other like to the said money of England, knowing the money to be false, to merchandize or make payment, in deceit of our said lord the king and of his people. And if a man slay the chancellor, treasurer, or the kings justices of the one bench or the other, justices in eire, or justices of assize, and all other justices assigned to heare and determine, being in their place doing their offices. And it is to be understood, that in the cases above rehearsed, it ought to be judged treason, which extend to our lord the king and his royall majestie; and of such treason the forfeiture of the escheates pertaineth to our lord the king, as well of the lands and tenements holden of others, as of himself.

1 H. 4. cap. 10.

1 E. 6. cap. 12.

1 Mar. cap. 1.
Stat. 1.

And albeit nothing can concerne the king, his crowne, and dignity, more then *crimen læsæ majestatis*, high treason: yet at the request of his lords and commons, the blessed king by authority of parliament made the declaration, as is above-said: and therefore, and for other excellent lawes made at this parliament, this was called *benedictum parliamentum*, as it well deserved. For except it be Magna Charta, no other act of parliament hath had more honour given unto it by the king, lords spirituall and temporall, and the commons of the realme for the time being in full parliament, then this act concerning treason hath had. For by the statute of 1 H. 4. cap. 10. reciting that where at a parliament holden 21 R. 2. divers paynes of treason were ordained by statute, in as much as there was no man did know how to behave himselfe, to doe, speak, or say, for doubt of such paines: It is enacted by the king, the lords and commons, that in no time to come any treason be judged otherwise, then it was ordained by this statute of 25 E. 3. The like honour is given to it by the statute of 1 E. 6. cap. 12. and by the statute of 1 Ma. cap. 1. sess. 1. different times, but all agreeing in the magnifying and extolling of this blessed act of 25 E. 3. Of this act of 1 Mariæ, we shall speak more hereafter.

hereafter. But to proceed to give a light touch how other acts of parliament have been called. The parliament holden at Oxford, *an.* 42. H. 3. was called *insanum parliamentum*. 12 E. 2. the parliament of whitebands, *albarum fibularum* or *metellarum*. 5 E. 3. *parliamentum bonum*. 10 R. 2. *parliamentum quod fecit mirabilia*, that wrought wonders. 21 R. 2. *magnū parliamentū*. 6 H. 4. *parliamentū indoctū*, lack-learning parliament. 4 H. 6. *parliamentū fustiū*, the parliament of bats. The session of parliament in *an.* 14. H. 8. called the black parliament. The act of 1 E. 6. was called *parliamentū pium*, the pious parliament. And the said act of 1 Mar. *parliamentū propitium*, the merciful parliament. The parliaments of queen Elizabeth stiled *pia, justa, et provida*. The parliament holden *anno* 21 of king James, called *foelix parliamentum*, the happy parliament. And the parliament holden in the third yeare of our soveraigne lord king Charles, *benedictum parliamentum*, the blessed parliament. The severall reasons of these former appellations appeare of record and in history, and the latter are yet fresh in memory. At the making of the statute of 25 E. 3. the high courts of justice were furnished with excellent men, *viz.* Sir William Shardshill knight (shortly written in bookes Shard) lord chiefe justice of the kings bench, and his companions justices of that court; Sir John Stonor knight, commonly written in books Stone, lord chief justice of the court of common pleas, and his companions justices of that court; and Gervasius de Wilford, lord chiefe baron of the exchequer, men famous in their profession, and excellent in the knowledge of the lawes. At the making of the statute of 1 H. 4. were Sir Walter Clopton knight, lord chiefe justice of the kings bench, and his companions justices of that court; and Sir William Thirning knight, lord chief justice of the court of common pleas, and his companions justices of that court; and Sir John Cassie knight, lord chiefe baron of the exchequer; men equall to any of their predecessors in the knowledge of the lawes. At the making of the statute of 1 E. 6. were Sir Richard Lister knight, lord chiefe justice of the kings bench, and his companions justices of that court; and Sir Edward Montague knight, lord chiefe justice of the court of common pleas, and his companions justices of that court; and Sir Roger Cholmeley knight, lord chiefe baron of the exchequer; men of that excellency, as they were worthy of the name of The worthies of the law. At the making of the statute of 1 Mar. were Sir Thomas Bromley knight, lord chiefe justice of the kings bench, and his companions justices of that court; and Sir Richard Morgan, knight, lord chiefe justice of the court of common pleas, and his companions justices of that court; and Sir D. Brook knight, lord chiefe baron of the exchequer, men renowned for their great knowledge and judgement in their profession. All these we have named in the honour of

them, and of their families and posterities, for that they in their severall times were great furtherers of these excellent lawes concerning treason. *In memoria æterna erit justus.* And all this was done in severall ages, that the faire lillies and roses of the crowne might flourish, and not be stained by severe and sanguinary statutes. But let us come to the act it selfe, and for the better understanding thereof, and of the book-cases, and other records grounded upon the same: let us divide this act concerning high treason into severall classes or heads, and then prosecute the same in order.

The first concerneth death,	{ By compassing { King, } and declaring the or imagining { Queene, } same by some the death of the { Prince, } overt deed.	
	{ By killing and murdering of the { Chancellor. Treasurer. Justices of the one Bench or other. Justices in eyre. Justices of assize. Justices of oier and terminer, &c. }	
		{ In their places doing their offices.

The second concerneth, { the kings consort, or queene.
violation, that is, to vio- { the kings eldest daughter unmarried.
late or carnally to know { the princes wife.

The third is levying war against the king.

[4]

The fourth is adhering to the kings enemies within the realme, or without, and declaring the same by some overt act.

The fifth is counterfeiting of { the great seale.
the privie seale.
the king's coyne.

The sixth and last, by bringing into this realme counterfeit money to the likenesse of the kings coine, &c.

So as treason is *membrum divisum*, and these severall classes or heads are *membra dividenda*. And if the offence be not within one of these classes or heads, it is no treason.

(1) *Treason* is derived from [*trahir*] which is treacherously to betray. *Trahue*, betrayed, and *trahison*, per contractionem, treason, is the betraying it selfe.

Detegit imbelles animos, nil fortiter audens
Proditio.

Inser leges Canuti, fo. 118. ca. 61. Proditiones (Hapond rrice)

NUMERO-

numerabantur inter scelera jure humano inexpiabilia. Treason is divided into two parts, viz. high treason, *alta proditio*, and into petit treason, *proditio parva*. The Latin word used in law is *proditio* (*à prodere*) and thereof cometh *proditoriè*, which of necessity must be used in every indictment of treason, and cannot be expressed by any other word, periphrasis, or circumlocution.

(2) *Ad fait declarifement.*] This law is for the most part declaratory of the ancient law, and therefore this word (*declarifement*) is used. But yet the studious reader shall observe, that in divers clauses it addeth to the former law, whereunto this word (*declarifement*) will sufficiently extend.

(3) *Quant home, &c.*] This extendeth to both sexes, *homo* including both man and woman. This act is generall, and therefore extendeth to some persons which claimed a priviledge to be exempted from secular jurisdiction. (For example,) ^a Adam de Orleton bishop of Hereford was indicted of high treason for aiding the Mortimers, &c. with men, and armour against king E. 2, &c. Whereupon he was arraigned, and alledged *se absque offensa Dei, et sanctæ ecclesiæ, et absque licentia domini summi pontificis non posse nec debere respondere in hac parte*. And thereupon the archbishop of Canterbury, York, and Dublin, and their suffragans came to the barre, claimed his priviledge, and took him away; and he was so far from punishment, as he was after translated to Worcester, and after to Winchester. But this statute (to cleare all doubts) extendeth to all persons, * as well ecclesiasticall as temporall, and so hath it ever since been put in execution, as hereafter in divers cases it appeareth. See hereafter cap. Murdre et Larceny.

A man that is *non compos mentis*, as shall be said more fully hereafter in the next section, or an infant within the age of discretion is not (*un home*) within this statute; for the principall end of punishment is, that others by his example may feare to offend, *ut pœna ad paucos, metus ad omnes perveniat*: but such punishment can be no example to mad-men, or infants that are not of the age of discretion. And God forbid that in cases so penall, the law should not be certaine; and if it be certaine in case of murder and felony, *à fortiori*, it ought to be certaine in case of treason.

If a man commit treason or felony and confesseth the same, or be thereof otherwise convict, if afterward he become *de non sane memorie* (*qui patitur exilium mentis*) he shall not be called to answer: or if after judgement he become *de non sane memorie*, he shall not be executed, for it cannot be an example to others.

And all aliens that are within the realme of England, and whose soveraignes * are in amity with the king of England, are within the protection of the king, and doe owe a locall obedience to the king, (are *homes* within this act) and if they commit high treason against the king, they shall be punished as traytors, but otherwise it is of an enemy, whereof you may reade at large, lib. 7. Calvin's case, fol. 6, &c. and 17, &c.

(4) *Fait compasser.*] Let us see first what the compassing or imagining the death of a subject was before, and at the time of the making of this statute, ^a when *voluntas reputabatur pro facto*. And ^b Bracton saith, that *spectatur voluntas et non exitus, et nihil interest utrum quis occidat, aut causam mortis præbeat*. So as when the law was so holden, he must *causam mortis præbere*, that is, declare the

^a Rot. Romana. 17 E. 2. m. 6. Rot. Claus. 1 E. 3. part 1. memb. 13. Artic. Cleri. 9 E. 3. cap. 15, & 16. Tr. 21 E. 3. coram rege Rot. 173. *Privilegium seculare non competit seditioso equitanti cum armis, &c. secundum leges ecclesiæ.*

25 E. 3. stat. 1. cap. 4. which was before this act. Mich. 31 E. 3. coram rege Rot. 55. Buck. Abbot de Miffeny. See in the Chap. of Clergy in what cases the priviledge of clergy is taken away.

* To persons ecclesiasticall and temporall.

Bract. lib. 3. 120, 121. 134, 135. Britton, 5. 18. Fleta, cap. 23. 30. Mirror, cap. 1. cap. 2. § 11. de appeale de homicide, 3 E. 3. cor. 383. 25 E. 3. 42. cor. 139. 26 aff. 27. 3 H. 7. cap. 1. 3 H. 7. 1. 12. 21 H. 7. 31. 1. Mar. Dier. 104. Tr. 32 E. 1. Coram rege. 15. 8 E. 2. Corone. 369. 395. Cusum. de Norm. cap. 79. fo. 94, 95. 33 H. 8. cap. 20. 1 & 2 Mar. c. 10. To aliens.

* [5]

^a See hereafter, cap. 73. Where and how *voluntas reputabatur pro facto*, by the ancient law and the change thereof.

^b Bracton, fol.

^c 15 E. 2. tit.
Cor. 383.

^d Note this word
[compassed.]

** Sed hæc voluntas non intellecta fuit de voluntate nudis verbis, aut scriptis propalata, sed mundo manifestata fuit per apertum factum, Id est, cum quis dederat operam, quantum in ipso fuit, ad occidendum, et sic de similibus.*

^e *Infidiator viarum.* See hereafter, cap. 5. De Heresie.

25 E. 3. 42. 27. aff. p. 38. 4 H. 4. ca. 2. 13 H. 4. 7. per Gascoign.

But see 9 E. 4. fo. 26. *Infidiator viarum* without taking of somewhat, resolved to be no felony.

V. lib. 11. fo. 29. b. Al. Poulter's case. Vid. postea cap. 16. Robbery, in fine.

Glanvil, lib. 14. cap. 14. lib. 1.

c. 2. Braet. lib. 3. f. 118. Britton, fol. 16. & 39. b.

Note the word *Compasse*.

Fleta, lib. 1. c. 21.

Mirr. cap. 1. § 5. cap. 2. § 11.

Note this word *Compasse*.

Mirror, c. 2. § 11. De lappeale de majestie.

Rot. pat. 25 E. 3. part 1. m. 16.

Vide Mic. 4 H. 4. Coram rege.

Rot. 22.

See hereof more in the 57 cha. of Appeales.

Braet. Britton, Fleta, &c.

same by some open deed tending to the execution of his intent, or which might be cause of death, as justice ^c Spigurnel reporteth a case adjudged; that a man's wife went away with her avowterer, and they ^d compassed the death of the husband, and as he was riding towards the sessions of oier and terminer and gaole-delivery, they assaulted him and stroke him with weapons, that he fell downe as dead, whereupon they fled; the husband recovered and made hue and cry, and came to the sessions and shewed all this matter to the justices, and upon the warrant of the justices, they were taken, indicted, and arraigned; and all this speciall matter was found by verdict; and it was adjudged that the man should be hanged, and the woman burnt. And Sir William Beresford, chiefe justice of the common pleas said, that before him and his companions justices of oier and terminer and gaole-delivery, a youth was arraigned, for that he would have stolne the goods of his master, and came to his masters bed, where he lay asleepe, and with a knife attempted with all his force to have cut his throat; and thinking that he had indeed cut it, he fled, whereupon the master cried out, and his neighbours apprehended the youth; and all this matter being found by special verdict, in the end he was adjudged to be hanged, &c. *Quia * voluntas reputabitur pro facto.* So as it was not a bare compassing or plotting of the death of a man, either by word, or writing, but such an overt deed, as is aforesaid, to manifest the same. So as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing. ^e But if a man had imagined to murder, or rob another, and to that intent had become *infidiator viarum*, and assaulted him, though he killed him not, nor took any thing from him, yet was it felony, for there was an overt deed. But in those days, in the case of the king, if a man had compassed, or imagined the death of the king (who is the head of the commonwealth) and had declared his compassing, or imagination by words or writing, this had been high treason, and a sufficient overture by the ancient law. And herewith agree all our ancient books. Glanvil saith, *cum quis de morte regis, &c. infamatur, &c.*

Braet. in the title *de criminibus læsæ majestatis. Ipse accusatus præloquutus fuit mortem regis.* And Britton. fol. 16. *grand treason est a compasser nostre mort.* and fo. 39. b. *cyface lencusor son appeale &c. que il cya mesme cēi John pur parler tiel mort, ou tiel treason &c.* And Fleta saith in his title *de crimine læsæ majestatis, si quis mortem regis ausu temerario machinatus fuerit &c. quamvis voluntatem non perduxit ad effectum.* And the Mirror saith, *crime de majestie est un peche horrible fait al roy &c. p. ceux q. occirent le roy, ou compassant a faire.* And it will delight you (in respect of reverend antiquity) to heare a president of an appeale (which then and after was in use) of high treason, *en pleine pliam. &c. en temps roy Edmond en cestes parolx. Rocelyn icy dit vers Waligrot illonq. q. a tiel iour tiel anne del raigne de tiel roy, en tiel lieu vient celui Waligrot a cēi Rocelyn, et luy trova destre en compary, et en aide ensemblement ove Atheling, Thurkild, Ballard, et autres de faire prisonier, ou en tache pur occire nre seignior le roy Edmond, ou en autre maner p. coupe feloniousment, et a ceo faire fuer entreinres a ceo counsel celer, et a ceo felony issint fornit selonq. leur poier.* By all which it is manifest, that compassing, machinating, counselling, &c.

to

to kill the king, though it hath no other declaration thereof but by words, was high treason by the common law. And see hereafter, *verb. per overt fait, et de ceo provablement, &c.*

(5) *Fait compasser ou imaginer.*] So as there must be a compassing or imagination, for an act done *per infortunium*, without compassing, intent, or imagination, is not within this act, as it appeareth by the expresse words thereof. *Et actus non facit reum, nisi mens sit rea.* And if it be not within the words of this act, then by force of a clause hereafter, *viz. Et pur ceo que plusieurs autres, &c.* It cannot be adjudged treason, untill it be declared treason by parliament, which is the remedie in that case, which the makers of the law provided in that case. This compassing, intent, or imagination, though secret, is to be tryed by the peers, and to be discovered by circumstances precedent, concomitant, and subsequent, with all endeavour evermore for the safety of the king. This was the case of Sr. Walter Tirrel a French knight, who the first day of August *ann. 13 Williel. 2. ann. dom. 1100* being a hunting with the king in the new forest, was commanded by the king to shoot at a hart, *exiit ergo telum volatile, et obstante arbore in obliquum reflexum faciens, per medium cordis regem sauciavit, qui subito mortuus corruit.*

It appeareth also by the Custumer of Normandy, treating of treason, and the exposition of the same, that this act was not treason. To calculate or seek to know by setting of a figure or witchcraft, how long the king shall raigne or live, is no treason, for it is no compassing, or imagination of the death of the king, within this statute of 25 E. 3. and this appeareth by the judgment of the parliament in 23 Eliz. whereby this offence was made felony during the life of queen Eliz. which before was punishable by fine and imprisonment.

The ancient law was, that if a mad man had killed or offered to kill the king, it was holden for treason; and so it appeareth by king Alfred's law before the conquest, and in lib. 4. in Beverlyes case. But now by this statute and by force of these words, *fait compasser ou imaginer la mort*, he that is *non compos mentis* and totally deprived of all compassings, and imaginations, cannot commit high treason by compassing or imagining the death of the king: for *furiosus sola furore punitur*: but it must be an absolute madnesse, and a totall deprivation of memorie. And this appeareth by the statute of 33 H. 8. for thereby it is provided, that if a man being *compos mentis* commit high treason, and after accusation, &c. fall to madnesse, that he might be tryed in his absence, &c. and suffer death, as if he were of perfect memory: for by this statute of 25 E. 3. a mad man could not commit high treason. It was further provided by the said act of 33 H. 8. that if a man attainted of treason became mad, that notwithstanding he should be executed; * which cruell and inhuman law lived not long, but was repealed, for in that point also it was against the common law, because by intendment of law the execution of the offender is for example, *ut pena ad paucos, metus ad omnes perveniat*, as before is said: but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others.

Regula.

Mat. Par. pa. 51.
Holling. pa. 26. b.
Mat. Westm.
W. Maimesbury.

Custum. de Nor.
cap. 14.

Vide inter Indictamenta de
17 E. 4. de Th.
Burdit. al. sed
judicandum est
legibus, et non
exemplis.

23 Eliz. cap. 2.

* Inter leges Al-
veredi, cap. 4.

lib. 4. fo. 124.

Beverlie's case.

Ovid. Scilicet in
superis etiam for-
tuna luenda est.

Nec veniam loco
numine, casus ba-
bet.

33 H. 8. cap. 20.

* 1 & 2 Ph. and
Mar. ca. 10.

^a Bract. lib. 3.
fo. 118.

Britton, cap. 8.
a disheriter.

Glanv. lib. 1.
cap. 2.

Fleta, lib. 1.

cap. 21.

Mirror, ca. 1. § 5

Vers roy de la
tre.

^a 13 Eliz. cap. 1.
nota declared.
Brook, tit.
treason, 24.
^b 1 H. 4. 1.
19 H. 6. 47.
13 H. 8. 12.
vide infra verb.
(16) Per overt
fait.

3 Mar. Dier.
131. pl. 7.

[7]

1 & 2 Phi. and
Mar. cap. 10.

Vide 11 H. 7. c. 1.

4 E. 4. 1.
9 E. 4. 1. 2.

Hil. 1 Ja. in the
case of Watson
and Clark semi-
nary priests.
9 E. 4. 1. b.

See the pre-
amble, *Auxint*
pur ceo que divers
opinions ont estre
eins ceux beures,
que en case doit
estre dit treason, et
in quel case nemi.
Rot. parliam.
4 E. 3. num. 5.
* Eodem rot.
num. 3. and 4.

Plac. in parliam.
E. 1. anno regni
sui, 33 North.
Rot. 17. & 22.

(6) *Mort.*] * He that declareth by overt act to depose the king, is a sufficient overt act to prove, that he compasseth and imagineth the death of the king. And so it is to ^b imprison the king, or to take the king into his power, and manifest the same by some overt act, this is also a sufficient overt act for the intent aforesaid. But peruse advisedly the statutes of 13 Eliz. cap. 1. 2. & 14 Eliz. cap. 1.

(7) *Nrē seignior le roy.*] These words extend to all his successors, as it hath been alwayes taken.

(8) *Le roy.*] Is to be understood of a king regnant, and not of one that hath but the name of a king, or a nominative king, as it was resolved in the case of king Phillip, who married queen Mary, and was but a nominative king, for queen Mary had the office and dignity of a king, so as she that wanted the name of a king, but had the office and dignity, was within this act of 25 E. 3. And hee that had the name, and not the office and dignity of the king was not within it. And therefore an act was made, that to compassse or imagine the death of king Phillip, &c. during his marriage with the queen, was treason. A queen regnant is within these words (*nrē seignior le roy*) for she hath the office of a king.

This act is to be understood of a king in possession of the crowne, and kingdom: for if there be a king regnant in possession, although he be *rex de facto, et non de jure*, yet is he *seignior le roy* within the purvien of this statute. And the other that hath right, and is out of possession, is not within this act. Nay if treason be committed against a king *de facto, et non de jure*, and after the king *de jure* cometh to the crowne, he shall punish the treason done to the king *de facto*: and a pardon granted by a king *de jure*, that is not also *de facto*, is voyde.

If the crown descend to the rightfull heire, he is *rex* before coronation: for by the law of England there is no *interregnum*: and coronation is but an ornament or solemnity of honour. And so it was resolved by all the judges Hil. 1 Ja. in the case of Watson and Clarke seminary priests: for by the law there is alwayes a king, in whose name the lawes are to be maintained, and executed, otherwise justice should faile. Divers kings before the conquest voluntarily renounced their kingly office: and so did king H. 2. in the 16. yeare of his reigne, and Henry his sonne was created and crowned.

It appeareth by Britton, that to compassse the death of the father of the king, is treason, and so was the law holden long after that: for after king E. 2. had dismissed himselfe of his kingly office, and duty, and his sonne by the name of E. 3. was crowned, and king regnant, those cursed caitifs, Thomas Gourny, and William Ocle, and others were attainted of high treason for murdering the king's father, who had been king by the name of E. 2. and had judgement to be drawne, hanged, and quartered.

* The like judgement was given against Sir John Matrevers knight, and others, as being guilty of the death of the king's uncle, Edmond earl of Kent, which at that time (being so neer of the bloud royall) was by some holden also treason. But now this act of 25 E. 3. hath restrained high treason in case of death (*al mē seignior le roy, sa compaignie, et al eigne fitz, et heire le roy.*

Nicholas de Segrave was charged in open parliament *in præsentia dni. reg. comitum, baronum, et aliorum de consilio regis tunc ibi existent*, that

that the king in the warre of Scotland being amongst his enemies, Nicholas Segrave his liege man, and holding of the king by homage, and fealty, served him for his aid in that warre, did maliciously move contention and discord without cause, with John de Crombe- well, charging him with many enormous crimes, and offered to prove it upon his body. To whom the said John answered, that he would answer him in the king's court, as the court should con- sider, &c. and thereupon gave him his faith. After Nich. with- drew himselfe from the king's host, and from the king's aid, leav- ing the king amongst his enemies, *in periculo hostium suorum*, and ad- journed the said John to defend himself in the court of the king of France, and prefixed him a certaine day, *et sic quantum in eo fuit, subjiciens, et submittens dominium regis, et regni subjectioni dni. regis Francie, ad hoc faciendum, iter suum arripuit usque Doveriam, ad transfretandum, &c.* All which the said Nich. confessed, *et volun- tati dni. regis de alto et basso inde se submisit. Et super hoc dns. rex vo- lens habere avisementum comitum, baronum, magnatum, et aliorum de consilio suo, injunxit eisdem in homagio, fidelitate, et ligeantia quibus ei tenentur, quod ipsum fideliter consulerent, qualis pœna pro tali facto sic cognito fuerit infligenda: qui omnes, habito super hoc diligenti tractatu, et avisamento, consideratis, et intellectis omnibus in prædicto facto contentis, &c. dicunt quod hujusmodi factum meretur amissionem vitæ et membro- rum, &c.* So as this offence was then solemnely in parliament ad- judged high treason. But this is taken away by this act of 25 E. 3. being not under any of the classes, or heads specified in this act.

[8]

So piracy by any of the king's subjects upon another, was taken to be treason before this act, for so is the book to be intended, be- cause a pirat is *hostis humani generis*. But by this act it is not now to be judged treason. See hereafter in the chapter of Piracy.

40 Ass. 23.

One doth marie a queen regnant, if the husband compasse the death of the queene, and declare the same by overt act, he is guilty of treason, and punishable by this act, for to this and many other purposes she is a distinct person by the common law. And so if a queene wife of a king regnant, compasse the death of the king, and declare the same by overt act, she is guilty of treason, and punish- able by this act. So as (that we may speak it once for all) by these and many others that might be cited, (some whereof shall hereafter be touched) the preamble of this act appeareth to be true, that di- vers opinions had been before the making of this act, what offences should be adjudged high treason, and what not.

Britton, cap. 8.
and other ancient
authors *ubi supra*.

This statute having restrained the compassing, &c. of death to the king, queen, and prince, it came to passe after the making of this act, that in 3 R. 2. two citizens of London, John Kerby, mer- cer, and John Algore, grocer conceiving malice against John Impe- riall Janevois of S. Mary in Genoa that came as ambassadour from the state of Genoa to the king (under the king's letters of safe con- duct, for alliance to be had betweene the king and the duke and comminalty of Genoa aforesaid) for that the said John Imperiall had obtained a * monopolie to furnish this land (keeping his staple at Southampton) of all such wares as came from the Levant, so plentifully as was to be had in all the west parts of Christendome, the said John Imperiall was killed by them, as more at large appears by the record. And albeit the said John Imperiall was an ambaf-
sadour

Rot. parlia.
3 R. 2. num. 18.
See placita co-
ram rege Hill.
an. 3 R. 2. (Ca-
vendish) rot. 8.
London Holl.
cron. 3 R. 2.
pa. 422. 60. b.
&c.

* Monopoly.

nota his end.

2 Regum, cap. 10.
4. 12. 31.

The killing of a
foreine ambas-
sador.

Honor legati, bo-
nor mittentis est,
et proregis dedecus
redundat in re-
gem.

22 Aff. p. 49.
Mort dun ambas-
sador. le roy.

sadour under the king's safe conduct, and the killing of him was *justi belli causa*, yet the killing of him was no treason, because it was not under any of the said classes or heads, until it was at that time declared by parliament in these words, *quel case examine et dispute inter les seigniors, et commons, et puis nre. al roy en pleine parliament, estoit illonques devant nre. seignior le roy declares, determinus et assensus, que tiel fait, et coupe est treason, et crime de royall majestie blemie, en quel case il ne doit allower a nulluy priviledge del clergie*, and accordingly the said Kerby and Algore were attainted of high treason in the king's bench, Hill. 3 Rich. 2. *ubi supra*: but this declaration is taken away by the statute of 1 Mariæ, as hereafter shall be said, and yet of this declaration we shall make much use hereafter.

In the 22 yeare of E. 3. which was about 3 yeares before the making of this act, one John at Hill had murdered A. de Walton the king's ambassador, *nuncium dni. regis miss. ad mandatum regis exequendum*: this was adjudged high treason, for which he was drawne, hanged, and beheaded, &c. For true it is, *quod legatus ejus vice fungitur, a quo destinatur, et honorandus est sicut ille cujus vicem gerit, et legatos violare contra jus gentium est*. But by this act of 25 E. 3. it is restrained to the death *de nre. seignior le roy*, and therefore *prorex* is not within this statute.

(9) *Sa compaigne*.] This word *compaigne*, (which is all one with confort or wife) was used, that compassing, &c. must be during the marriage with the king, for after the king's death she is not *sa compaigne*, and therefore it extendeth not to a queene dowager, and for this cause this word *compaigne* was used in this act.

Britton *ubi supra*.

(10) *Le fitz eigne et heire le roy*.] The eldest sonne and heire of a queen regnant is within this law. Before this statute some did hold, that to compass the death of any of the king's children, was treason. But by this act it is restrained to the prince, the king's sonne, being heire apparant to the crowne for the time being: and he need not be the first begotten sonne, for the second after the decease of the first begotten without issue, is *fitz eigne* within this statute, *et sic de cæteris*. If the heire apparant to the crowne be a collateral heire apparant, he is not within this statute, untill it be declared by parliament, as it was in the duke of York's case.

Roger Mortimer, earle of March, was in *anno domini* 1487 (11 R. 2.) proclaimed heire apparant. *Anno* 39 H. 6. Richard duke of York was likewise proclaimed heire apparant. And so was John de la Poole earle of Lincolne, by R. 3. And Henry marquise of Exeter, by king Henry the eighth. But none of these or of the like, are within the purview of this statute. And now that we have handled compassings and imaginations, let us proceed to the residue which concerne acts and deeds.

Heire is here taken for heire apparant, for he cannot be heire in the life of the father.

Mirror, ca. 1. § 5.
Brit. c. 23.
fo. 43. a.

(11) *Si home violast la compaigne le roy*.] The Mirror saith, *Crime de majestie vers le roy p. ceux avowterors q. spergissent la feme le roy*. Whereby it appeareth that this was high treason by the common law.

33 H. 8. cap. 21.

Violare is here taken for *carnaliter cognoscere*; and it is no treason, unlesse it be done during the marriage with the king, and extendeth not to a queene dowager, as hath been said. And if the wife
of

of the king doth yeeld and consent to him that committeth this treason, it is treason in her.

(12) *Ou la compaignie de leur fitz et heire.*] This also extendeth to the wife of the prince during the coverture betweene them, and not to a dowager, and if the wife yeeld and consent to him that commits this treason, it is treason in her.

Heire.] Here is taken *ut supra*, for heire apparant.

(13) *Ou leigne file nient marie.*] (That is,) eldest daughter not married at the time of the violation, albeit there had been an elder daughter then she, who is dead without issue. * The Mirror. *Avowterors q. spergissent la file le roy eignes legitime, avant ceo q. el soit marie.*

And the reason that the eldest only is here mentioned, is, for that for default of issue male, she only is inheritable to the crowne.

(14) *Ou si home leva guerre enconter nostre seignior le roy.*] ^a This was high treason by the common law, for no subject can levie warre within the realme without authority from the king, for to him it only belongeth, See F. N. B. 113. a. *Le roy de droit doit savor et defender son realme vers enemies, &c.*

^b A compassing or conspiracy to levie war, is no treason, for there must be a levying of war *in facto*. But if many conspire to levie war, and some of them do levie the same according to the conspiracy, this is high treason in all, for in treason all be principals, and war is levied.

If any levie war to expulse strangers, to deliver men out of prisons, to remove counsellors, or against any statute, or to any other end, pretending reformation of their own heads, without warrant; this is levying of war against the king: because they take upon them royall authority, which is against the king. There is a diversity betweene levying of war and committing of a great riot, a rout, or an unlawfull assembly. ^c For example, as if three, or foure, or more, doe rise to burne, or put down an inclosure in Dale, which the lord of the manor of Dale hath made there in that particular place; this or the like is a riot, a rout, or an unlawfull assembly, and no treason. But if they had risen of purpose to alter religion established within the realme, or laws, or to go from town to town generally, and to cast downe inclosures, this is a levying of war (though there be no great number of the conspirators) within the purvien of this statute, because the pretence is publick and generall, and not private in particular. And so it was resolved in the case of Richard Bradshaw, miller, Robert Burton, mason, and others of Oxfordshire, whose case was, that they conspired and agreed to assemble themselves with so many as they could procure at Enflowe-hill in the said county, and there to rise, and from thence to go from gentlemans house to gentlemans house, and to cast downe inclosures, as well for enlargement of high-ways as of errable lands. And they agreed to get armour and artillery at the lord Norrys his house, and to weare them in going from gentlemans house to gentlemans house for the purpose aforesaid, and to that purpose they perswaded divers others: and all this was confessed by the offenders. And it was resolved, that this was a compassing and intention to levie war against the queen, because the pretence was publick within the statute of 13 Eliz.

cap,

Pasch. 28 H. 8. in Spilman's Reports in case of Queen Anne. 33 H. 8. ubi supra, in case of Queen Katherine.

* Mirror, ca. 1.

§ 5.

See Brit. cap. 23.

fo. 43, 44. and

cap. 29. fol. 71.

1 Mar. Parl. 2.

c. 1.

a Glanvil, lib. 1.

cap. 2. l. 14. c. 1.

Bracton, lib. 3.

fol. 118.

Britton, f. 16, &c.

Fleta, li. 1. ca. 21.

Mir. ca. 1. § 5.

^b 1 Mar. 98. b.

Dier. in Sir N.

Throgmorton's

case.

See 21 E. 3. 23.

21 R. 2. cap.

Repeale.

1 H. 4. cap. 3.

8 E. 3. 20.

See hereafter,

cap. 73. against

going or riding

armed.

^c See Rot. Parl.

in Cro. Epiphan.

20 E. 1. Rot. 23.

Humfrey de Bo-

hun's case. 4 Eliz.

210. b. Dier.

See the statute of

1 Mar. ca. 2. By

which, grand

riots in some

cases be made

felony.

[10]

Pasch. 39 Eliz.

by all the judges

of England, 1

being attourney-

generall, and

present.

cap. 1. (the letter whereof herein shortly followeth,) and the offenders were attainted and executed at Enslow-hill.

And this diversity is proved by a latter branch of this act.

Et si per case ascun home de cest realme chimancha arme discovert secretment ove gents armes, contre ascun autre, pur luy tuer, ou disrober, ou pur luy prender, ou retayner tanq. il face fine, ou ransome pur sa deliverance, nest lentention le roy et de son counsell, q. en tiel case soit adjudge treason; mes soit adjudge felony, ou trespasse, solong. le ley del tre. auncientment use. Whereby it appeareth, that bearing of armes in warlike manner, for a private revenge or end, is no levying of war against the king within this statute. So that every gathering of force is not high treason. And so it was resolved in parliament, in 5 H. 4 rot. parliam. nu 11. & 12. the earle of Northumberland's case.

Rot. Parl. 5 H. 4.
nu. 11, 12.

13 Eliz. cap. 1. b.
The indictments
and attainders of
treason by force
of this statute
are not more to
be followed, be-
cause the statute
which made
them good, is
expired.

Dier, 3 & 4 Ph.
and Mar. 144.
10 E. 4. 6. 1 Mar.
Treason, Br. 24.
Ter. Mic. 8 H. 8.
Mich. 7 H. 5.
Coram rege.
Heref. Rot. 20.

By the said statute of 13 Eliz. cap. 1. it is enacted, declared, and established, that during the naturall life of queene Elizabeth, if any wit' in the realme or without, should compasse, imagine, invent, devise, or intend to levie war against her majesty, within this realme, or without, and the same declare by writing, or word, &c. that it should be high treason: so during the life of the queen, a conspiracy to levie war was high treason, though no war were levied; and upon that law, Bradshaw, Burton, and others, were attainted of high treason, for conspiracy only to levie war. But it was resolved by all the justices, that it was no treason within the statute of 25 E. 3. as hath been said. The words in this law are [*levie guerre*] an actuall rebellion or insurrection is a levying of war within this act, and by the name of levying war is to be expressed in the indictment. If any with strength and weapons invasive, and defensive, doth hold and defend a castle or fort against the king and his power, this is levying of war against the king within this statute of 25 E. 3.

It was resolved by all the judges of England in the reigne of king H. 8. that an insurrection against the statute of labourers, for the inhanfing of salaries and wages, was a levying of war against the king, because it was generally against the kings law, and the offenders took upon them the reformation thereof, which subjects by gathering of power ought not to do. It was specially found, that divers of the kings subjects did minister and yeeld victuals to Sir John Oldcastle, knight, and others, being in open war against the king, and that they were in company with them in open war; but all this was found to be *pro timore mortis, et quod recesserunt, quam cito potuerunt*: and it was adjudged to be no treason, because it was for feare of death. *Et actus non facit reum, nisi mens sit rea.* And therefore this in them was no levying of war against the king within this act.

(15) *Ou soit adherent as enemies nostre seigniour le roy, a eux donant aide et comfort en son roialme et aylors.]*

Adherent.] ^a This is here explained, viz. in giving aide and comfort to the king's enemies within the realme or without: delivery or surrender of the king's castles or forts by the kings captain thereof to the kings enemy within the realme or without for reward, &c. is an adhering to the kings enemy, and consequently treason declared by this act. ^b A. is out of * the realme at the time of a rebellion within England, and one of the rebels flye out of the

^a Rot. Parl.
20 E. 1. nu. 2.
John de Brit-
taine's case.
Rot. Parl. 33 E. 1.
Rot. 6. Rob. de
Ros de Werke's
case. 8 E. 3. 20.
38 E. 3. 31. a.
Parl. 4 R. 2.
nu. 17, 18, &c.
5 R. 2. Triall 54.
Hil. 18 E. 3. co-
ram rege. Rot.
145. Eborum,
43. Aff. 28. 42.
Aff. 29.
Gilbert de M.
was a Scot.
Rot. Parl. 7 R. 2.
nu. 15. 17. 24.
7 H. 4. 47.
Cust. de Norm.
ca. 73.
^b Vid. 13 Eliz.
Dier. 298.

* [11]

the realme, whom A. knowing his treason doth aide or succour, this is no treason in A. by this branch of 25 E. 3. because the traytor is no enemy, as hereafter shall be said; and this statute is taken strictly.

As enemies.] *Inimicus* in legall understanding is *hostis*, for ^c the subjects of the king, though they be in open war or rebellion against the king, yet are they not the king's enemies, but traytors; for enemies be those that be out of the allegiance of the king. If a subject joine with a foraine enemy, and come into England with him, he shall not be taken prisoner here and ransomed, or proceeded with as an enemy shall, but he shall be taken as a traytor to the king.

^d An enemy coming in open hostility into England, and taken, shall be either executed by marshall-law, or ransomed; for he cannot be indicted of treason, for that he never was within the protection or ligeance of the king, and the indictment of treason saith, *contra ligeantiam suam debitam*.

^e David prince of Wales levied war against E. 1. this was treason, for that he was within the homage and ligeance of the king, and had judgement given against him as a traytor, and not as an enemy. And albeit in many presidents of indictments, subjects that be rebels, and traytors, &c. be called *proditores et inimici*; yet within this statute they are not *inimici*.

^f In the duke of Norfolk's case the question was, a league being between the queene of England and the king of Scots, whether the lord Herise and other Scots *in aperto prælio* burning and wasting divers townes in England without the assent of the king, were enemies in law within this statute, and resolved that they were.

^g See more hereafter in this third part of the Institutes. cap. 49. of Piracy, &c. upon the statute of 28 H. 8. cap. 15.

Ou per ailers.] That is to say, out of the realme of England. But then it may be demanded, how should at this time this forraigne treason be tried? And some ^h of our books doe answer, that the offender shall be indicted and tried in this realme where his land lyeth, and so it was adjudged in 2 H. 4. But now by the statute of 35 H. 8. cap. 2. (which yet remains in force) all offences made or declared, or hereafter made or declared treasons, misprisions of treason, and concealments of treason, committed out of the realme of England, shall be inquired of, heard, and determined, either in the king's bench or before commissioners in such shire as shall be assigned by the king. If it be before commissioners, it hath been commonly used, that the king doth write his name in the upper part of the commission. But in the case of Patrick o'Cullen an Irishman, the queene did put her signature to the warrant to the lord keeper, and not to the commission: * and it was holden by the justices that the one way and the other was a sufficient assignement by the king within the statute of 35 H. 8.

ⁱ It was resolved by all the judges of England, that for a treason done in Ireland the offender may be tryed by the statute of 35 H. 8. in England, because the words of the statute be, all treasons committed out of the realme of England, and Ireland is out of the realme of England. And so it was resolved in Sir John Parrot's case. And our word here [*per ailers*] is as much as out of the

realme

See hereafter,
35 H. 8. cap. 2.

^c 43 Ass. 28, 29.
33 H. 6. 1.
19 E. 4. 6. a.
and b. 4 Mar.
Treason. Br. 32.
1 Mat. ibid. 24.
21 E. 3. 23.
22 Ass. p. 49.
13 El. Dyer, 298.
Ex libro de Griffin de Perkin Werbeck.

^d Dier, 4. Mar.
fo. 145. a.
Lib. 7. fo. 6. b.
Calvin's case.

^e Fleta, lib. 1.
c. 16.

^f Mich. 13. & 14.
Eliz. per Justice.
19 E. 4. 6. b.
18 H. 6. ca. 4.
20 H. 6. cap. 1.
^g 27 E. 3. cap. 13.
31 H. 6. cap. 4.
7 E. 4. 14.
13 E. 4. 9.
21 E. 3. 16, 17.
Regist. 129. Fit.
N. B. 114.

^h 4 Ass. p. 15.
5 R. 2. *ubi supra*.
19 E. 4. 6. b.
Dier. 3. Mar. 132.
Pasch. 2 H. 4.
coram rege.
Rot. 8. Wallia.
35 H. 8. cap. 2.
3 Mar. *ubi supra*.
13 Eliz. Dier.
298. Stanford
Pl. Cor. fo. 90. a.
and b. See the
first part of the
Institutes, 440.

* Hil. 36 Eliz. in
the case of Patrick
o'Cullen,
for a treason at
Brussels in *partibus
marinis*.

ⁱ 33 El. in Or-
nick's case. lib. 7.
f. 23. Calvin's
case. *Vid.* Dier.
Mich. 19 & 20
Eliz. fo. 360.
lib. 11. fo. 63. in
Doct. Foster's
case.

^k 28 H. 8. ca. 15.
This act con-
cerning treasons
is not taken away
by the statute of
35 H. 8. cap. 2.
Vide infra
cap. 49. fo. 181.
of Piracy, &c.
Vid. 5 Eliz. c. 5.

[12]

^g See 1 E. 6. ca. 12.
the last clause.
5 E. 6. ca. 11.
1 & 2 Ph. & Mar.
ca. 10. and 11.
1 Eliz. cap. 6.
13 Eliz. cap. 1.
Stanf. pl. Cor.
89. and 164.
Br. coron. 4 Mar.
220.
Dier. 2 Mar.
fo. 99.

[•] Rot. parl. an.
33 E. 1. Rot. 6.
Jo. Salvyn's case.
^h 43. Aff. 28.
8 E. 3. 20.
7 H. 4. 27.
34 E. 3. cap. 12.
Lib. 4. fo. 57.
the Sadler's case.

^{*} 29 H. 6. cap. 1.

Vide supra verbo
¶ Mort. fo. 6.
Vide 21 R. 2.
cap. 3. but it is
repealed by
1 H. 4. ca. 3.
^{*} Hill, 36 Eliz.
Doctor Lopes
case, 13 Eliz. c. 1.
Brooke, Treason,
24.

Hill. 1 Ja. R.
Lo. Cobham's
case.

realme of England. See Pasch. 2 H. 4. *coram rege* rot. 8. Salop. Treason in Wales.

^k All treasons done upon the sea shall be inquired, heard, and determined in such shires and places of the realme as shall be limited by the king's commission, in like forme and condition, as if the same had been done upon the land, &c. after the common course of the lawes of this land. And by the preamble it appeareth, that it could not be tryed by the common law, but by the civill law before the lord admirall. See hereafter in the exposition of the statute of 28 H. 8. cap. 15. *et infra*, cap. 49.

(16) *Et de ceo provablement soit attaint per overt fait per gents de leur condition.*] In this branch four things are to be observed, & first this word [*provablement*] provably, that is, upon direct and manifest proof, not upon conjecturall presumptions, or inferences, or straines of wit; but upon good and sufficient proove. And herein the adverb [*provablement*] provably, hath a great force, and signifieth a direct and plain proof, which word the king, the lords, and commons in parliament did use, for that the offence was so hainous, and was so heavily, and severely punished, as none other the like, and therefore the offender must provably be attained, which words are as forcible, as upon direct and manifest proof. Note, the word is not (probably) for then *commune argumentum* might have served, but the word is [*provably*,] be attained.

2. This word (*attaint*) necessarily implyeth that he be proceeded with, and attained according to the due course, and proceedings of law, and not by absolute power, or by other meanes, * as in former times had been used. ^h And therefore if a man doth adhere to the enemies of the king, or be slaine in open warre against the king, or otherwise die before the attainder of treason, he forfeiteth nothing, because (as this act saith) he is not attained: wherein this act hath altered that, which before this act, in case of treason, was taken for law. And the statute of 34 E. 3. cap. 12. saves nothing to the king, but that which was in *esse*, and pertaining to the king at the making of that act. And this appeareth by a judgement in parliament in *anno* 29 H. 6. cap. 1. that * Jack Cade being slaine in open rebellion could no way be punished, or forfeit any thing, and therefore was attained by that act of high treason.

3. *Per overt fait,*] *per apertum factum.* This doth also strengthen the former exposition of the word (*provablement*,) that it must be provably, by an open act, which must be manifestly proved. As if divers doe conspire the death of the king, and the manner how, and thereupon provide weapons, powder, * poison, assay harness, send letters, &c. or the like, for execution of the conspiracy. Also preparation by some overt act, to depose the king, or take the king by force, and strong hand, and to imprison him untill he hath yeelded to certaine demands, this is a sufficient overt act to prove the compassing, and imagination of the death of the king: for this upon the matter is to make the king a subject, and to dispoyle him of his kingly office of royall government. And so it was resolved by all the judges of England. Hill. 1 Jac. *regis*, in the case of the lo. Cobham, lord Gray, and Watson and Clarke seminary priests: and so had it been resolved by the justices, Hill. 43. Eliz. in the case of the earles of E. and of S. who intended to goe to the court

court where the queen was, and to have taken her into their power, and to have removed divers of her counsell, and for that end did assemble a multitude of people; this being raised to the end aforesaid was a sufficient overt act for compassing the death of the queen. And so by woful experience in former times it hath fallen out, in the cases of king E. 2. R. 2. H. 6. and E. 5. that were taken, and imprisoned by their subjects. And this is made more plain by the legall forme of an inditement of treason: for first it is alledged according to this act, *quod * proditoriè compassavit, et imaginatus fuit mortem et destructionem dni. regis, et ipsum dom. regem interficere, &c.* in the second part of the inditement is alledged the overt act, *et ad illam nephandam, et proditoriam compassationem, imaginationem, et propositum suum perficiend' et perimplend'* and then certainly to set downe the overt fact for preparation to take, and imprison the king, or any other sufficient overt act, which of necessity must be set downe in the inditement. Hereby it appeareth how insufficient many inditements were of high treason, wherein it was generally alledged, that *per apertum factum compassavit et imaginatus fuit mortem dom. regis, &c.* * For example *termo. Mic. anno 5 E. 6.* Edward duke of Somerset was indited before commissioners of oyer and terminer in London, *quod ipse deum præ oculis suis non habens, sed instigatione diabolica † seductus, apud Holborne in parochia Sancti Andreæ infra civitatem London, viz. 20 die Aprilis anno regni domini regis Edw. sexti quinto, et diversis diebus et vicibus antea et postea false, maliciose, et proditoriè * per apertum factum circumivit, compassavit, et imaginavit cum diversis aliis personis prædictum dominū regem de statu suo regali deponere et deprivare, &c.* Which indictment, and all others of like forme were against law, as hath been said, and of the matter of this indictment that noble duke was by his peers found not guilty. But then it may be demanded, for what offence he had judgement of death, and 2. what law made it an offence. The offence appeareth in his indictment, for the former part thereof contained high treason, whereof he was acquitted, and the latter part contained one only offence of felony (whereof he was found guilty) in these words, *et ulterius juratores præd. præsentant, quod præfatus Edwardus dux Somerset deū præ oculis suis non habens, sed instigatione diabolica seductus 20 Maii an. regni dicti dom. regis Edwardi sexti quinto supradieto, ac diversis aliis diebus et vicibus antea et postea apud Holborn in præd. paroch. Sancti Andreæ in civitate London, et apud diversa alia loca infra civitatem London præd. felonice ut felo dicti dom. regis per aperta verba et facta procuravit, movit, et instigavit complurimos subditos ipsius domini regis ad insurgendum, et apertum rebellionem et insurrectionem infra hoc regnum Angliæ movend' contra ipsum dominum regem, et ad tunc et ibid. felonice ad capiendum et imprisonandum prænobilem Johannem comitem Warwick de privato consilio domini regis ad tunc existen', contra pacem dicti domini regis coronam et dignitatem suam, et contra formam statuti in hujusmodi casu editi et provisi.* The statute whereupon this indictment was intended to be grounded, was the branch of the statute of 3 and 4 E. 6. by which it is provided, "That if any person or persons by ringing of any bel, &c. or by malicious speaking or uttering of any words, or making any outcry, &c. or by any other deed or act shall raise or cause to be raised or assembled any persons to the number of 12 or above, to the intent that the same persons should

* In ancienttime traditiōse, et felonice. parl. 33 E. 1. rot. 6. Robert de Ros his case, but now proditoriè is necessarily required.

Vide Britton, fo. 16. et 19.

1 Mar.

Br. treason. 24.

* Ter. Mic. 5 E. 6.

Lib. Intr. Coke, fo. 482.

Sanguinis O maledicta sitis, &c.

† [13]

* Per apertum factum.

Vid. hereafter ca. 5. de Heresie, generall indictments against Lollards, &c.

The residue of the indictment of the duke of Somerset.

To take and imprison one of the privie councill. Contra formam statuti.

3 & 4 E. 6. cap. 5.

should do, commit, or put in ure any of the acts and things above mentioned (whereof to take and imprison any of the kings most honourable privie counsell was one) and the persons to the number of 12 or above so raised and assembled after request and commandement (in such sort as in that act is prescribed) shall make their abode and continue together, as is aforesaid, (in the act) or unlawfully perpetrate, doe, commit, or put in ure any of the acts or things aforesaid, that then all and singular persons by whose speaking, deed, act, or any other the meanes above specified any persons to the number of 12 or above, shall be raised or assembled for the doing, committing, or putting in ure any of the acts or things above mentioned, shall be adjudged for his so speaking or doing a felon, and suffer execution of death as in case of felony, and shall lose his benefit of sanctuary and clergy." Hereby it doth manifestly appeare, that the truth concerning this nobleman's attainder, and execution in divers things, is contrary to the vulgar opinion, and some of our chronicles, and in some points contrary to law. First, that for the felony made by the said branch of the said act he could not have had his clergie, for clergy in that case is expressly ousted by the said act. 2. That he was not indicted for going about, &c. the death of the earle of Warwick then of the kings privie counsell, but only for his taking or imprisonment, and therefore could not be indicted upon the statute of 3 H. 7. as some have imagined. 3. That the indictment is altogether insufficient, for it pursueth not the words or matter of the said branch of the said act, as by comparing of them it manifestly appeareth; which (we being desirous that truth may appeare in all things) we have thought good upon this occasion to adde for advancement of truth. 4. That being but attainted of felony, he could not by law be beheaded, as elsewhere we have shewed. And this act that created the felony saith, that such a felon shall suffer execution of death, as in case of felony. 5. Lastly, this whole act was justly holden to be a doubtful and dangerous statute, and therefore was deservedly repealed. And after the fall of this duke, see the preamble of the statute of subsidie of 7 E. 6.

And now to returne to cases of high treason. If a man be arraigned upon an indictment of high treason, and stand mute, he shall have such judgement, and incurre such forfeiture, as if he had been convicted by verdict, or if he had confessed it. For this standeth well with this word *provablement*, for *fatetur facinus, qui iudicium fugit*; but otherwise it is in case of petit treason, murder, or other felony.

If a subject conspire with a foraine prince beyond the seas to invade the realme by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the king, for by this act of parliament in that case there must be an overt act. * *Qui capiti, aut saluti regis perfidiose sive solus, sive servis aut sicariis mercede conductis stipatus insidiabitur, vita et fortunis ejus omnibus privator.* So as thereby an overt act was required.

The composition and connexion of the words are to be observed, viz. [thereof be attainted by overt deed.] † This relateth to the severall and distinct treasons before expressed), and specially to the compassing and imagination of the death of the king, &c. for that it is secret in the heart) and therefore one of them cannot be

3 H. 7. ca. 14.

Lib. 9. fo. 114.
in seignior Sanchez's case.

1 Mar. cap. 12.
1 Eliz. ca. 16.
7 E. 6. ca. 12.

[14]

13 Eliz. Dier, 298.
13 Eliz. cap. 1.
Nota bene. Vide supra verbo Mort.

* Inter leges Alveredi, cap. 4.

† So resolved by the justices Pasc. 35 Eliz. which we heard and observed.

be an overt act for another. As for example: a conspiracy is had to levie warre, this (as hath been said and so resolved) is no treason by this act untill it be levied, therefore it is no overt act or manifest proove of the compassing of the death of the king within this act: for the words be (*de ceo, &c.*) that is, of the compassing of the death. For this were to confound the severall classes, or *membra dividenda, et sic de cæteris, &c.*

^a Divers latter acts of parliament have ordained, that compassing by bare words or sayings should be high treason; but all they are either repealed or expired. And it is commonly said, that bare words may make an heretick, but not a traytor without an overt act. And the wisdom of the makers of this law would not make words only to be treason, seeing such variety amongst the witnesses are about the same, as few of them agree together. But if the same be set downe in writing by the delinquent himselfe, this is a sufficient overt act within this statute.

^b Cardinall Poole, albeit he was a subject to H. 8. and of the kings blood, (being descended from George duke of Clarence, brother to king E. 4.) yet he in his booke of the supremacy of the pope, written about 27 H. 8. incited Charles the emperour, then preparing against the Turke, to bend his force against his naturall soveraigne lord and countrey; the writing of which booke was a sufficient overt act within this statute: and to move the emperour the rather in that book, he made H. 8. almost as ill as the Turk, in these words, *in Anglia sparsum nunc est hoc semen, ut vix à Turcico internosci queat, idque autoritate unius coaluit.*

^c In the preamble of the statute of 1 Mar. concerning the repeale of certaine treasons, &c. It is agreed by the whole parliament, that lawes justly made for the preservation of the common-wealth without extreame punishment, are more often obeyed and kept, then lawes and statutes made with great and extreame punishments: and in speciall, such lawes and statutes so made: whereby not only the ignorant and rude unlearned people, but also learned and expert people minding honesty, are oftentimes trapped and snared, yea, many times ^{*} for words only, without other fact or deed done or perpetrated: therefore this act of 25 E. 3. doth provide, that there must be an overt deed. But words without an overt deed ^d are to be punished in another degree, as an high misprision.

Per gentes de leur condition.] That is, *per pares*, or their equals, whereof we have spoken before in the exposition of the ^e 29 chapter of Magna Carta. verb. *per judicium parium suorum*, and more shall be said hereafter. This branch (*per gentes de leur condition*) extendeth only to a conviction by verdict, whereof the statute particularly speaketh; but yet where the party indicted confesseth the offence or standeth mute, he shall have judgement as in case of high treason. For this branch being affirmative, is taken *cumulative* and not *privative*. And therefore seeing upon confession, or standing mute, the judgment in case of high treason was given at the common law, this act being, as it hath been said, affirmative, taketh not away the same: and (to say once for al) the clause hereafter of restraint of like cases, &c. extends onely to offences, and not to tryalls, judgements, or executions.

^a 26 H. 8. cap. 13.

1 E. 6. cap. 13.

1 & 2 Ph. and

Mar. cap. 9, 10.

1 Eliz. cap. 6.

13 Eliz. ca. 1, &c.

14 Eliz. cap. 1.

^b See the fourth part of the Institutes, ca. 26. Brook, treason 24 writing of letters.

^c 1 Mar. cess. 1.

c. 1. See the

statute of 3 H. 7.

hereafter, cap. 4.

directly in the

point by the

judgement of

the parliament.

Nota, this act of

25 E. 3. saith, *per*

overt fait, per

apertum factum,

and not *per aper-*

tum dictum, by

word or confes-

sion.

See 25 H. 8. c. 12.

Eliz. Barton,

Edw. Locking,

and others at-

tainted by parlia-

ment for divers

words and con-

spiracies which

being not within

this act without

an overt act they

could not be at-

tainted by the

common law.

^{*} *Nota.*

^d See in the chap-

ter of Misprision.

[15]

^e Mag. Car.

ca. 29.

Braet. l. 3.
fo. 118.
Brit. fo. 10, &c.
Braet. l. 5.
fo. 414.
Fleta, l. 1. ca. 21.
Mirror, ca. 1. § 6.
de fauonerie.
29 Aff. pa. 49.
* 1 E. 3. tit. Chre.
F. 13. 22 Aff.
Pl. 49.

2 R. 3. 9.

3 H. 7. 10. a.

40 Aff. p. 33.

Rot. Claus.
42 E. 3. nu. 8.
in coro.

2 H. 4. fo. 25.

*Errores ad sua
principia referre,
est resellere.*
To bring errors
to their begin-
ning, is to see
their last.

(17) *Si home counterface le grand seale.*] All our ancient authors agree that this was high treason by the common law, and for this offence his judgement was to be drawn, hanged, and quartered, at the common law, as in other cases of high treason, (the counterfeiting of the kings mony excepted.) See the second part of the Institutes. W. 1. cap. 5.

* In ancient time every treason was comprehended under the name of felony, but not *à contra*: and therefore a pardon of all felonies was sometime allowed in case of high treason. But the law is, and of long time hath been otherwise holden: and if the inditement were *felonicè*, and not *proditoriè*, (for the king may lessen the offence, if it please him) then the pardon of felonies is good at this day, for no inditement can be of high treason without this word (*proditoriè*;) and *in qualibet prodicione implicatur felmia, quia in quolibet brevi de exigendo super quolibet indictamento de prodicione proclamator facit sic*, I. B. an exigent on thy head of treason and felony.

A compassing, intent, or going about to counterfeit the great seale is no treason, but there must be an actuall counterfeiting, also it must be to the likenesse of the kings great seale, the words be, *counterface le grand seale le roy*.

Now it is to be seen what shall be said a forging, or counterfeiting of the great seale. If the lord chancellor, or lord keeper put the great seale to a charter &c. without warrant, this is no treason, because the great seale is not counterfeited. But it seemeth by Briton fo. 10. b. that it was treason at the common law, and of that opinion is Fleta fo. 29. a. but it is no treason now (without question) by the negative clause of this act.

If a man take wax lawfully imprinted with the great seale from one patent, and fix it to a writing purporting a grant from the king, there have been divers opinions in this case what the offence is, which we will rehearse.

In 40 Aff. which was about 15 years after the making of this act, it was not holden high treason, but a great misprision, for that it is no counterfeiting of a new, but an abuse of the true great seale.

In 42 E. 3. the abbot of Bruer caused Rob. Rigge his commoigne to rase a charter of R. 1. and put out the manner of Fisettruda, and in place thereof put in Elleghe. And this offence was heard, and sentenced before the king and his counsell in the star-chamber, as a great offence and misprision: for if it had been high treason, it should have had another tryall, and yet this was a great abuse of the great seale.

2 H. 4. The taking of the great seale from one patent and fixing it to a commission to gather mony, &c. was adjudged to be such an offence, as the offender had judgement to be drawne, and hanged. The record of which case we have perused, and the effect thereof is this. The partie is indited generally for counterfeiting of the great seale, whereunto he pleaded not guilty, and the jury found him not guilty of the counterfeiting of the great seale, as was supposed by the inditement, and found further specially, that he tooke the great seale from one patent, and put it to the commission, and that the party put the same in execution, and there judgement was given, that he should be drawne and hanged: which (whatsoever the offence was) ought not to have been given upon this

this verdict, the jury finding him not guilty of the offence alledged in the inditement: and besides the judgement is such, as is given in case of petit treason, and not of high treason. Hereby it appeareth how dangerous it is for any to report a case by the ear, specially concerning treason, unlesse he had advisedly read the record: for (as I take it) the misreport of this case hath hatched errors, and he mistooke the judgment, if it had been high treason, for then it should have been drawne, hanged, and quartered.

37 H. 8. Br. tit. Treason. A chaplain had fixed such a great seale to a patent of dispensation with non-residence, and this was holden a misprision, and not high treason, for it was an abuse of the great seale, and no counterfeiting of it. Stanford saith that it was adjudged in his time according to the book of 2 H. 4. *et sic ex errore sequitur error.*

G. Leak a clark of the chancery joyned two cleane parchments fit for letters patents so close together with mouth glew, as they were taken for one, the uppermost being very thinne, and did put one labell through them both, then upon the uttermost he writ a true patent, and got the great seale put to the labell, so the labell and the seale were annexed to both the parchments, the own written, and the other blanck: he cut off the glewed skirts round about, and tooke off the uppermost thinne parchment (which was written, and was a true and perfect patent) from the labell, which with the great seale did still hang to the parchment, then he wrote another patent on the blancke parchment, and did publish it as a good patent. Hereupon two questions were moved. 1. Whether this offence be high treason or no. 2. If it be high treason, then whether he may be indited generally for the counterfeiting of the great seale, or els the speciall fact must be expressed. And upon conference had between the judges, upon great advisement and consideration it was in the end, concerning the first point, resolved by the justices (saving a very few) upon the authorities aforesaid, and for that it was no counterfeiting of the great seale within this statute, that this offence was neither high treason, nor petit treason, because it is not within either of the branches of this statute, but it is a very great misprision, and the party delinquent liveth at this day. As to the 2. point it was resolved, that if the speciall matter had amounted to counterfeiting of the great seale in law within this act, then he might have been generally indited of high treason for counterfeiting the great seale. As if a man in an affray kill a constable that comes to keep the kings peace without any expresse malice prepenfed, this is murder in law, and yet the delinquent may bee generally indited of murder by malice prepenfed.

And ^a Fleta who wrote before this act telleth us, that *crimen falsi dicitur, cū quis illicitus (cui non fuerit ad hoc data auctoritas) de sigillo regis rapto vel invento, et brevia cartasque consignaverit.* But whatsoever offence it was before the making of this statute, it is after this statute no high treason, because it is no counterfeiture of the great seale, but a misusur thereof.

Qui ^b convictus fuerit pro falsatione sigilli dom. regis, quod tradatur episcopo Sarum, qui eum petiit ut clericum suum sub pœna et in forma qua decet, quia videtur concilio quod in tali casu non admittenda est purgatio, &c. Hereby it should appeare that in those dayes a man might have had his clergie for this offence, and therefore as some hold, it

[16]

37 H. 8. Br.
Treason.Stanf. Pl. Coron.
fo. 3. c.
Bracton agreeth
with it. *Ubi supra.*
Leak's case. Hil.
4 Ja. R.40 Aff. 33.
42 E. 3. Rot. Cl.
Ubi supra.
37 H. 8. Br. dev.^a Fleta, l. 1. ca. 22.
Britton, fo. 10. b.
See before, fo. 15.^b Rot. Parl. Hil.
18 E. 1. fo. 92.
nu. 125.

^c 1 Mar. cap. 6.
1 & 2 Ph. and
Mar. ca. 11.

* 19 H. 6. 47.
3 H. 7. 10. Stanf.
Pl. Coron. 3. vide
postea, cap. 64.
principall and ac-
cess. See Mich.
13 & 14 Eliz.
Dier, 296.
Conier's case.

^d See Mat. Par.
anno 34 H. 3.
pag. 753. *de pe-*
cunia approbata
et reprobata.
Et Walsingham,
28 E. 1. anno
Dom. 1300. stat.
31 E. 1. *de weightis*
et measures.
Rast. 7.

[17]

^e Vet. Magna
Chart. ca. Itin.
fo. 151. a.
22 Aff. p. 49.
3 H. 7. 10.
25 E. 3. 42. b.
Coro. 130.

^f 6 H. 7. 13.
1 R. 3. 1.

^g Walf. Hyp.
Neustrie, pa. 69.
1278. 6 E. 1.

^h 3 H. 7. 10. a. b.

^a See inter leges
Athelstani,
ca. 14.

Canuti, cap. 61.
Britton, cap. 5.
fo. 10. b.

See the Mirror,
ca. 1. § 6. De la
mony falsifie acc'
with 3 H. 7. and
ca. 5. § 1. and
Fleta, ca. 22. acc.

^b Mirr. ca. 1. § 3.
inter Artic. per-
viels royes or-
deinus.

Rot. Par. 17 E. 3.
nu. 15. Vide hic
postea, cap. 31.

45 E. 3. ca. 13.
9 H. 5. cap. 11.
Stat. 1.

See the second part of the Institutes, ca. 20. Artic. super Cart. and the exposition upon the same.

^c 3 H. 5. ca. 6. 1 E. 6. cap. 12. 5 Eliz. cap. 11.

gain. ^e 18 Eliz. cap. 1.

^f 14 Eliz. cap. 3.

^d Nota, for wicked lucre and

^g See hereafter, cap. Principall

and Accessory.

was not then holden to be high treason, and herein also is the preamble of this act, concerning divers opinions in case of treason, verified.

This statute naming the great seale and privie seale, the forging and the counterfeiting of the privie signet, or of the signe manuell was not within this statute. But by the ^e statute of 1 Mar. it is made high treason in both cases. Albeit that in this act there is no mention made of ^a ayders and consenters to this counterfeiting, yet they are within the purview of this statute, for there be no accessories in high treason.

(18) *Ou sa^d monye.* ^e This was treason by the common law, as it appeareth by all the said ancient authors, *ubi supra (verbo, si home counterface le grand seale)* and therefore the opinion in 3 H. 7. is holden for no law, that it was but felony before this act. ^f The forging of the kings coine, is high treason, without utterance of it, for by this act the counterfeiting is made high treason. See the second part of the Institutes. W. 1. cap. 15. ^g See Thom. Walsingham. *Hypodigme Neustrie. an. dom. 1278. judei pro tonsura monetæ in magna multitudine ubique per Angliam suspenduntur, &c.*

^h *Si ipse qui facit monetam autoritate regis, &c. illam facit minus in pondere vel allaiata, viz. alcumino vel alio falso metallo contra ordinationem, &c.* This is there holden to be high treason, and by that book taken for a counterfeiter of the kings money within the purview of this statute. ^a And herewith agreeth Britton, who saith, *des fauceres q. ount nostre menye counterfet ou plus de allaye mise in nostre monye, q. nuster, ne serroit solonq. le forme et usage de nostre realme.*

^b *Ordeine fuit q. nul roy de cest realme ne puit changer sa money, ne imparer, ne amender, ne auter monye faire q. de ore et argent, sans lassent de tous les counties.* It was ordained, that no king of this realme might not change his money, nor impaire, nor amend the same, nor other money make then of gold or silver, without assent of parliament.

^c Clipping, washing, and filing of the money of this realme, was no counterfeiting of it within this act. And therefore being a like case, it was declared by parliament in anno 3 H. 5. cap. 6. to be high treason: but that act being repealed by 1 *Mariae* the statute of 5 Eliz. cap. 11. hath ^d declared, that clipping, washing, rounding, or filing, for wicked lucre and gaine, &c. to be high treason. And by the statute of ^e 18 Eliz. it is declared, that if any person for wicked lucre or gaines-fake, shall by any art, wayes, or meanes whatsoever, impaire, diminish, falsifie, scale, or lighten the kings money, &c. it is high treason, for being a like case, it was to be declared by parliament.

Forging ^f or counterfeiting of foraine money, which is not currant within the realme, is misprision of treason, and the offender shall forfeit, as for concealement of high treason.

Sa money ^g This extendeth only to the kings money coyned within this realme; and therefore after this statute, if a man had counterfeited the money of another kingdome, though it were currant within this realme, it was no treason, untill it was so de-

clared

clared by parliament ^h in an. 1 Mariæ, and in an. 1 & 2 Ph. and M. and the said acts of 5 Eliz. & 18 El. do extend to forrain coyne currant within this realme. And it is holden, that at the making of this statute of 25 E. 3. there was no money currant within this realme, but the kings own coyne. ⁱ See the statute called *statutum de moneta magnum, et statutum de moneta parvum*. And it is to be knowne, that if any doe counterfeit the kings coyne contrary to this statute of 25 E. 3. ^k he shall have the punishment of his body, but as in case of petit treason, that is, to be drawne and hanged till he be dead, but the forfeiture of his lands is as in other cases of high treason, for this statute is but a declaration of the common law, and the reason of his corporall punishment is, for that in this case he was only drawne and hanged at the common law, but a woman in that case was to be burnt.

^l The abbot of Missenden in the county of Buckingham for counterfeiting and refection of the kings money, was adjudged to be drawne and hanged, and not quartered. The want of observation of the said distinction hath made some to erre in their judgement. Nota. This act of 25 E. 3. maketh no expression of the judgement, therefore such judgement as was at the common law either in case of high treason or petit treason must be given.

But if one be attainted for diminishing of the kings mony upon any of the statutes made in queen Maries time, or in the time of queen Elizabeth, because it is high treason newly made, the offender shall have judgement as in case of high treason, which judgement you may see in the first part of the Institutes. Sect. 747.

^m And when a woman commits high treason and is quick with childe, she cannot upon her arraignment plead it, but she must either pleade not guilty, or confesse it: and if upon her plea she be found guilty, or confesse it, she cannot alleage it in arrest of judgement, but judgement shall be given against her: and if it be found by an inquest of matrons that she is quick with childe, (for *priviment ensent* will not serve) it shall arrest, and respite execution till she be delivered, but she shall have the benefit of that but once, though she be againe quick with childe: so as this respite of execution for this cause is not to be granted, only in case of felony, whereof justice Stanford speaketh, but in case of high treason, and petit treason also.

(19) *Si home port faux money en cest roialme, counterfeit au money danglitterre, et sachant le money estre faux, &c.* By this branch six things are to be observed. First, that the bringing in of counterfeit money, and not the counterfeiting is expressed in this word [*apport.*] Secondly, that it must be brought from a foraine nation, and not from Ireland, or other place belonging to, or being a member of the crowne of England, and so it hath been resolved, so wary are judges to expound this statute concerning treason, and that in most benigne sense: for albeit Ireland be a distinct kingdome, and out of the realme of England to some purposes, as to protections and fines levied, &c. as hath been said: yet to some intent it is accounted as a member of or belonging to the crowne of this realme. And therefore a writ of error is maintainable here in the kings bench of a judgement given in the kings bench in Ireland, so as the judges did construe this statute not to extend to false money brought out of Ireland, Thirdly, it must be to the similitude of

^h 1 Mar. cap. 6.
1 & 2 Ph. and
Mar. cap. 11.

ⁱ Vet. Mag. Carta, part 2. fol. 38, 39, 40.

^k Fleta, lib. 1. c. 22. who wrote before this statute, which is but a law declaratory, as it appeareth before.

23 Aff. p. 2.
Dier, 6 Eliz.
Term. Tr. MS.
pro tonsura monete trabe et pend.

Tr. 24 H. 8. in Justice Spilmans Reports accord.

^l Mich. 31 E. 3. coram rege.
Rot. 55. Buck. within six yeares after making of our statute.

^m 25 E. 3. 42. b.
Cor. 130. 23 Aff. p. 2. 22 Aff. p. 71.
22 E. 3. Cor. 253.
12 Aff. p. 11.
8 E. 2. Cor. 410.

[18]

Stanford, f. ult. b.

Vid. hereafter, cap. 30.

Rot. Parl.

17 E. 3. nu. 15.

7 H. 7. 10.

Lib. 7. Calvin's case, *ubi supra*.

3 H. 7. 10.

the money of England. Fourthly, that the bringer of it into this realme, must know it to be counterfeit. Fifthly, uttering of false money in England, though he know it to be false and counterfeit to the likeness of the coyne of England, is no treason within this statute, unlesse he brought it from a foraine nation, for the words be, *si home apport faux money en cest realme*. But if money false or clipped be found in the hands of any that is suspicious, he may be imprisoned untill he hath found his warrant, *per statutum de moneta magn' vet. Mag. Cart. fo. 38. 2 parte*. Lastly, he must merchandize therewith, or make payment thereof, expressed in these words, *pur merchandizer, ou paiment faire in deceipt nostre seignior le roy et son people*. See more, *de moneta regis*, and of the derivation thereof in the second part of the Institutes, in *artic' super cartas*, cap. 20.

Si home tuast chancelour, tresurer, ou justice nostre seignior le roy del an banke ou del auter, justice in cire, ou daffises et tous auters justices assignes doier et terminer esteant en leur place feasant leur office.

In this case albeit one intend to kill any of these here named in their place, and doing their office, and thereupon strike or wound any of them, this is no treason: for our statute saith, *si home tuast chancelor, &c.* If a man kill the chancellour, &c. For if it be treason, death must ensue. And the reason wherefore it is treason in these cases is, because sitting judicially in their places, (that is, in the kings courts) and doing their office in administration of justice, they represent the kings person, who by his oath is bound that the same be done. And this act extends only to the persons here particularly named, and to no other: and therefore extendeth not to the court of the lord steward, or of the constable and marshal, nor to the court of the admiralty, or any other, nor to any ecclesiasticall court. Nay, it extends not to the high court of parliament, if any member of the lords house, or house of commons be slaine in his place, and doing his office, because it is *casus omissus*, and not mentioned in this act. But in all those cases it is wilfull murder, for the law implyeth malice.

^a Rot. Parliam.
20 E. 1. nu. 2.
John de Britain's
case.

3 Reg. 21. 15.
See inter leges
Alveredi, cap. 4.
ubi supra. Vita
et fortunis omni-
bus privator.
Cust. de Norm.
ca. 14. 22 lib.
Ass. pl. 49.

Et soit assavoir q. in les cases suisnomes doit ee adjudge treason q. se extend a nostre seignior le roy et sa royall majestie: et de tiel treason le forfeiture des escheates appartient a nostre seignior le roy cibien des tres. et tenements tenus des auters, come de luy mesme.

(20) ^a Des tres. et tenements tenus des auters come de luy mesme.]

This is an affirmation of the common law, and the reason thereof is, for that the offence is committed against the soveraign lord the king, who is the light and the life of the common-wealth: and therefore the law doth give to the king in satisfaction of his offence, all the lands, &c. which the offender hath, and that no subject should be partaker of any part of the forfeiture for this offence.

And where the words be [lands and tenements holden, &c.] yet the forfeiture extends to ^{*}rents charges, rents seck, commons, corrodies, and other hereditaments which are not holden, for in case of high treason the tenure is not materiall.

This clause hath 7. limitations. First, this act extends not ^b to lands in tayle, (saving only for the life of tenant in tayle) but the forfeiture of escheats is to be understood of such lands and tenements, as he might lawfully forfeit. And these generall words take not away

the

[19]

^c Brook, Esch. 9.
See hereafter.
Verbo. Et de tiel
manner de treason,
&c.

Otherwise it is
in case of petit
treason and fe-
lony

^b 7 H. 4. 27. See
hereafter in the
title of Premuni-
re. Verb. (des tres,
&c.) Vid. 26 H. 8.
cap. 13.

the statute of *donis conditional*^c but latter statutes give the forfeiture of estates in tail. 2. Nor doth this act extend to uses, but * latter statutes doe name uses. 3. ^d Nor to rights of actions, where the entrie is taken away, and so is the law cleerly holden at this day. 4. Nor to any conditions, but by a * latter statute conditions, unlesse they be inseparably knit to the person, be given to the king. 5. Nor to rights of entry, where any was in the lands ^f by title before the treason committed, but such a right of entry is since given by latter statutes. 6. Nor to lands or tenements, or rights ^g *in auter droit*, as in the right of the church, nor to lands in the right of a wife, but only during the coverture, and it extendeth to land which the offender hath ^h for life, for the forfeiture of the profits during his life. 7. It extendeth not to * a foundership of an house of religion *in free almoign*, for that is annexed to the bloud of the founder. Here goods and chattels be not named, but the forfeiture of them is implied in the judgement.

ⁱ *Nota* lector, the said acts of 26 H. 8. 33 H. 8. 5. and 6 E. 6. doe yet remain in force, notwithstanding the said statute of 1 Mar. as it hath been often adjudged and resolved, and namely Mich. 21. Ja. in the exchequer chamber, in a writ of error, upon a judgement given in the exchequer, between Ratcliffe, and the lord Sheffield, by all the judges of England, and is agreeable to common experience.

See more of high treason in the next chapter following, cap. 2. *verbo. Et pur ceo que plusors auters cases, &c.*

^c 26 H. 8. ca. 13. in fine. 33 H. 8. ca. 20. 5 & 6 E. 6. cap. 11. lib. 7. fo. 12, 13.
^{*} 23 H. 8. ca. 20. 5 E. 6. ca. 11.
^d Lib. 3. fo. 210. 7 H. 4. 6, &c.
^e 33 H. 8. c. 20. lib. 7. fo. 11. Englefield's case.
^f Englefield's case.
^g *Ubi supra.*
^h 5 E. 6. *ubi supra.*
ⁱ 1 Mar. Dier, 123. Dier, 12 El. 289. Temps. H. 8. Br. Coron. 5.
^h 1 Mar. Dier, 108.
^{*} 24 E. 3. 33. 72. Corody, Br. 5. Temps. H. 8. Escheat, 239.
ⁱ 12 El. Dier, 289. Lib. 3. fo. 10. 35. Lib. 7. fo. 33. 34. lib. 8. 72. 166. lib. 9. fo. 140. Stanf. Pl. Corone, 187. 2.

C A P. II.

OF PETIT TREASON.

ET ovesque ceo il y ad un auter manner de treason, cest assavoir, quant un servant tua son maister (1) ou un feme tua son baron (2), ou quant home seculer ou de religion tua son prelate a que il doit foye et obedience (3). Et de tiel manner de treason la forfeiture des escheats appertenant a chescun seignior de son fee proper, &c.

Britton, ca. 8. and cap. 22.

And moreover there is another manner of treason, that is to say, when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate to whom he oweth faith and obedience. And of such treason the escheats ought to pertain to every lord of his own fee, &c.

[20]

It was called high or grand treason in respect of the royall majesty against whom it is committed, and comparatively it is called petit treason (whereof now this statute speaketh) in respect it is

committed against subjects and inferiour persons, whereof this act doth enumerate three kinds.

(1) *Quant un servant tua son maister.*] This was petit treason by the common law, for so it appeareth by the ^a book of 12 Aff. that a woman servant killed her mistress, wherefore she had judgement to be burnt, which is the judgement at this day of a woman for petit treason. And herewith agreeth 21 E. 3. where the reader must know, that in stead of *mere* in that case you must read maister.

^b And upon this act, if the servant kill the wife of his master, it is petit treason, for he is servant both to the husband and wife.

^c If the child commit parricide in killing of his father or mother (which the law-makers never imagined any childe would doe) this case is out of this statute, unlesse the childe served the father or mother for wages, or meat, drink or apparell, for that it is none of these three kinds specified in this law. And yet the offence is far more hainous and impious in a child then in a servant, for *peccata contra naturam sunt gravissima*: but the judges are restrained by this act, to interpret this act, *à simili*, or *à minore ad majus*, as hereafter shall be said. And * some say that parricide was petit treason by the common law.

^d A servant of malice intended to kill his master, and lay in wait to doe it whilest he was his servant, but did it not till a year after he was out of service, and it was adjudged petit treason within this act.

(2) *Un feme tua son baron.*] ^e This was petit treason by the common law, as it appeareth in our books. If the wife procure one to murder her husband, and he doth it accordingly, in this case the wife being absent is but accessory, and shall be hanged and not burnt, because the accessory cannot be guilty of petit treason, where the principall is not guilty but of murder: and the * accessory must follow the nature of the principall: but if he that did the murder had been a servant of the husband, it had been treason in them both, and the wife should have been burnt. And so it is in the case before of a servant, and in the case hereafter of a clerk.

If the wife and a stranger kill the husband, it is petit treason in the wife, and murder in the stranger, and so it is in the case of the servant next before, and of the clerk next after.

Before this statute it was petit treason, *si quis falsaverit sigillum domini sui de cujus familia fuit*. Britton agreeth herewith. But these are taken away by this act, and all other saving these, that are here expressed.

(3) *Quant home seculer ou de religion tua son prelate a que il doit foy et obedience.*] This clause is understood only of an ecclesiasticall person, be he secular, or regular, if he kill his prelate, or superiour, to whom he oweth faith, and obedience, it is petit treason: and so it was at the common law. And petit treason doth presuppose a trust, and obedience in the offender, either civill, as in the wife and servant, or ecclesiasticall, as in the ecclesiasticall person.

Aidors, abettors, and procurers of any of these petit treasons, are within this law.

If the servant kill his mistress, viz. his masters wife, this is treason (as hath been said) not by equity, for that is denied as well in
*
petit

* 12 Aff. p. 30.
21 E. 3. 17.
F. coron. 447.
Statham, tit. cor.
21 E. 3. 22 Aff.
p. 49.

^b 19 H. 6. 47.
Pl. Com. 86. b.
Dier, 3 Mar. 128.
7 El. 235.

^c Exodus, c. 21.
v. 15. 17.
Lev. 20. v. 9.
1 Mar. per Brom-
ley and Portman
of the report of
Justice Dalison.
vid. 1 R. 3. 4.
*In culeo paricidae
cum simia, cane,
gallo, et serpente
inclusi mari olim
mergebantur: sed
nos non habemus
talem consuetudi-
nem.*

* 22 E. 1.
Math. Par. 874.

^d 33 Aff. p. 7.
Li. 1. f. 99.
Shelly's case.
10 H. 6. 47.
pl. com. 260.

^e 15 E. 2. Coron.
383. 19 H. 6. 47.
See c. Pr. & Acc.
Dier, 34 H. 8. 50.
Dier, 16 El. 332.
Saunders' case.
Pasch. 32 E. 3.
Rot. 62. coram
rege. Ph. Clif-
ton's case.

* 40 Aff. p. 15.
Fleta, li. 1. ca. 22.
Britton, fo. 16.
19 H. 6. 47.

40 Aff. ubi supra.
et 16 El. ubi sup.

19 H. 6. 47. by
all the judges.

petit treason, as high treason, but it is within the letter of this statute, for she is a master.

In high treason there is no accessories, but all be principalls, and therefore whatsoever act or consent will make a man accessory to a felony, before the act done, the same will make him a principall in case of high treason. But in case of petit treason, there may be accessories, either before, or after the act done, as in case of murder or homicide.

Here it appeareth that acts of parliament may bind men of the church, secular, or regular, and no benefit of clergy allowed unto them in case of treason: but ^a hereof you shall read at large in the exposition of the 15. chapter of *Articuli cleri*.

(3) *Et de tiel manner de treason forfeiture des escheats apperteinont a chescun seignior de son fee proper.*] See hereof hereafter in the chapter of forfeiture. ^b If a man seised in fee of a fair, market, common, rent charge, rent seck, warren, corrody, or any other inheritance, that is not holden, and is attainted of felony, the king shall have the profits of them during his life: but after his decease, seeing the blood is corrupted, they cannot descend to the heir, * nor can they escheat because they be not holden, they perish and are extinct by act in law: for in escheats for petit treason or felony, a tenure is requisite, as well in the case of the king, as of the subject.

An approver in case of felony, refusing the combat with the appellee, shall have like judgment that is for petit treason, *probator recusans duellum adjudicatur suspendi, et trahi in odium falsæ accusationis*: but yet it is not petit treason, because it is none of the three specified in this act.

The case which Shard reciteth in 40 Ass. that a Norman being leader of an English ship, who had English men with him, and robbed divers upon the sea, and were taken and found guilty: and as to the Norman it was but felony (because Normandy was lost by king John, and was out of the ligeance of E. 3.) and as to the English it was adjudged treason, and the offenders drawn and hanged, which was the judgement of petit treason: but this case must be intended to fall out before this statute of 25 E. 3. for it is none of the petit treasons mentioned in this act.

Et pur ceo que plusors auters cases de semblables treason (1) purront escheer en temps avener, queux home ne purra penser ne declarer en present: assentu est, que si autre case suppose (2) treason (3), que nest especifie paramount (4), aviegne de novel devant ascun justice, demoerge le justice sans aler a judgment de treason, tanque per devant nostre seignior le roy en son parliament (5) soit le case mre. et declare (6), le que le ceo doit estre adjudge treason, ou auter felony.

And because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time: it is accorded, that if any other case supposed treason, which is not above specified, doth happen before any justice, the justice shall tarry without going to judgement of the treason, till the cause be shewed and declared before

[21]

^a See the 2. pt of the Institutes. Artic. cleri. ca. 15. Hil. 3. R. 2. coram rege Rot. 8. London. Jo. Imperial's case.

For escheats see the 1. part of the Institut. sect. 1. fo. 13. a.

^b See before, cap. 1. verbo, des terres et tenements, &c.

* See 1 pt. of the Institutes, fo. 13. verb. Avera la terre per escheat. Mic. 4 H. 4. coram rege. Rot. 22. Anglia.

40 Ass. 25. Vide 2 H. 5. cap. 6.

Rerum progressus ostendunt multa, quæ initio prævideri non possunt.

before the king and his parliament, whether it ought to be judged treason or other felony.

(1) *Semblable treason.*] In this case, the judges shall not judge *à simili*, or by equity, argument, or inference of any treason, high or petit, for no like case shall be adjudged treason, &c. And note this branch extendeth (as hath been said) to the offence, viz. treason, and not to tryall, judgement, or execution.

(2) *Si auter case suppose treason.*] No other case, though of as high or higher nature, &c. shall be adjudged treason high or petit, as before it appeareth in the case of paricide, *anno 1 Maria, ubi supra.*

(3) *Treason.*] Either high treason, or petit treason, so as this branch extendeth as hath been said to the offence of treason only.

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See the exposition upon the statute, *de frang. prisonam.*

1 H. 6. 5.

9 E. 4. 26, &c.

See 1 Mar. of Justice Dalison's report, *ubi supra.*

1 Mar. cap. 1.

(4) *Que nest specifie paramount.*] This word [*specifie*] is to be specially observed, for it is as much to say, as particularized, or set downe particularly: so as nothing is left to the construction of the judge, if it be not specified and particularized before by this act. A happy sanctuary or place of refuge for judges to flye unto, that no mans blood and ruine of his family do lie upon their consciences against law. And if that the construction by arguments *à simili*, or *à minori ad majus* had been left to judges, the mischief before this statute would have remained, viz. diversity of opinions, what ought to be adjudged treason, which this statute hath taken away by expresse words: and the statute of 1 Mar. doth repeale all treasons, &c. but only such as be declared and expressed in this act of 25 E. 3. wherein this word [*expressed*] is to be observed.

Rot. Parl. 5 H. 4. nu. 11, 12. See nu. 15. Ibid.

In the parliament holden *anno 5 H. 4.* the earle of Northumberland came before the king and lords in parliament, and by his petition to the king, acknowledged to have done against his allegiance: and namely, for gathering of power and giving of liveries, whereof he prayeth pardon: and the rather, that upon the kings letters he yeelded himselfe, and came to the king unto Yorke, where he might have kept himselfe away. The which petition the king delivered to the justices by them to be considered. Whereupon the lords made protestation, that the order thereof belonged to them, as peers of the parliament, to whom such judgement belonged in weighing of this statute of 25 E. 3. &c. and they judged the same to be no treason, nor felony, but only trespassse finable at the kings will. And the opinion in 27 Aff. is denied, that if one of the indicters discover the counsell of the king, that it should be treason; because it is not specified before in this act, and therefore neither high treason, nor petit treason.

27 Aff. p. 63.

(5) *Tanque per devant le roy et son parlement.*] By this it is apparent, that any like or other case ought to be declared by the whole parliament, (and not by the king and lords of the upper house only, or by the king and the commons, or by the lords and commons.) And so was it done by the whole court of parliament in 3 R. 2. *ubi supra.* 5 Eliz. 18 Eliz. *ubi supra.* and many other acts of parliament.

Rot. Par. 17 R. 2. nu. 20.

John duke of Gwyen and of Lancaster, steward of England, and Thomas duke of Glocester, constable of England, the kings uncles,

uncles, complained to the king, that Thomas Talbot knight, with other his adherents, conspired the death of the said dukes in divers parts of Cheshire, as the same was confessed and well knowne, and prayed that the parliament might judge of the fault (which petition was just, and according to this branch of the statute of 25 E. 3.) but the record saith further: whereupon the king and lords in the parliament adjudged the same fact to be open and high treason: which judgement wanting the assent of the commons, was no declaration within this act of 25 E. 3. because it was not by the king and his parliament according to this act, but by the king and lords only.

(6) *Soit le case monstre et declare, &c.*] This declaration may be absolute, or *sub modo*, for a time.

By this which hath been said it manifestly appeareth, what damnable and damned opinions those were concerning high treason, of Tresilian chiefe justice of the kings bench, Sir Robert Belknap chiefe justice of the common bench, Sir John Holt, Sir Roger Fulthorp, and Sir William Burghe, knights, fellowes of the said Sir Robert Belknap, and of John Lockton one of the kings serjeants, that were given to king R. the 2. at Nottingham, in the eleventh yeare of his reigne. But more detestable were the opinions of the justices in 21 R. 2. and of Hanckford and Brinchley the kings serjeants, (and the rather, because they took no example by the punishment of the former) which affirmed the said opinions to be good and lawfull, saving Sir William Thirning chiefe justice of the common bench gave this answer: That declaration of treason not declared belongeth to the parliament; but to please, he said, that if he had been a lord or a peer of parliament, if it had been demanded of him, he would have made the like answers. These justices and serjeants being called in question in the parliament holden *anno* 1 H. 4. for their said opinions, answered as divers lords spirituall and temporall did) that they durst no otherwise do, for feare of death. It was thereupon enacted, that the lords spirituall and temporall, or justices, be not from thenceforth received to say, that they durst not for feare of death to say the truth. Which opinions being so manifestly against our said act of 25 E. 3. afterwards in the parliament holden 1 H. 4. it is affirmed by authority of parliament, that in the said parliament of 21 R. 2. divers statutes, judgements, ordinances, and stablishments were made, ordained, and given, erroneously and dolefully in great disherison and finall destruction and undoing of many honourable lords, and other liege people of this realme, and of their heires for ever. And therefore not only that parliament of 21 R. 2. and the circumstances and dependances thereupon, are wholly reversed, revoked, voided, undone, repealed, and adnulled for ever, but also the parliament holden in 11 R. 2. by authority of which parliament, Tresilian, Belknap, and the rest of those false justices and serjeants aforesaid were attainted, is confirmed, for that it was (as there the parliament affirmeth) for the great honour and common profit of the realme.

Et si per case ascun home. de cest roialme chivache armee, &c.] And if percase any man of this realme ride armed, &c. For exposition hereof, see the chapter hereafter against riding or going armed.

13 El. cap. 1, 2.
14 El. ca. 1, 2. &c.

Anno 21 R. 2.
in Latin.

11 R. 2. ca. 1.
and 4.

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Rot. Parl. 1 H. 4.
nu. 97.
*Melius est omnia
mala pati quam
malo consentire.*

1 H. 4. ca. 3.

See the consequence of erroneous opinions in case of high treason.
1 H. 4. cap. 4.

For

1 Mar. cap. 1.
Sessio prima.
 The like statute
 was made, anno
 1 E. 6. ca. 12.
 See the statute of
 1 H. 4. cap. 10. to
 the like effect.

Inter leges Can-
 nuti, cap. 1. *In-*
primis justæ leges
ut efferantur in-
justæ depriman-
tur.

Aliter in antiquo
 MS.

Inprimis ut justæ
leges erigantur,
injustæ subver-
tantur.

For the better instruction of the reader to discern what offences be high treason or petit treason at this day, it shall be necessary to adde hereunto the statute of 1 Mar. whereby it is enacted, [That no act, deed, or offence, being by act of parliament or statute made treason, petit treason, or misprision of treason, by words, writing, ciphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be high treason, petit treason, or misprision of treason, but only such as be declared and expressed to be treason, petit treason, or misprision of treason, in or by the act of parliament or statute made in the 25 yeare of the raigne of the most noble king of famous memory, king Edward the third, touching or concerning treason, or the declaration of treason, and none other, &c. any act or acts of parliament, statute, or statutes, had or made at any time heretofore or after the said 25 year of king E. 3. or any other declaration or matter to the contrary in any wise notwithstanding.]

Before this act so many treasons had been made and declared by act of parliament since this act of 25 E. 3. some in particular, and some in generall, and in such sort penned, as not only the ignorant and unlearned people, but also learned and expert men were many times trapped and snared: and sometimes treasons made or declared in one kings time, were abrogated in another kings time, either by speciall or generall words: so as the mischief before 25 E. 3. of the uncertainty what was treason, and what not, became to be so frequent and dangerous, as the safest and surest remedy was, by this excellent act of 1 Mar. to abrogate and repeale all, but only such as are specified and expressed in this statute of 25 E. 3. By which law, the safety both of the king and of the subject, and the preservation of the common-weale is wisely and sufficiently provided for, in such certainty, as *nihil relictum est arbitrio judicis.* And certainly the two rules recited in the preamble of the said act of 1 Mariæ, are assuredly true. The first, [that the state of a king standeth and consisteth more assured by the love and favour of the subject toward their soveraigne, then in the dread and fear of lawes made with rigorous pains and extreme punishment for not obeying their soveraigne.] And the other, [that lawes justly made for the preservation of the common-weale without extreme punishment or penalty, are more often, and for the most part better obeyed and kept, then lawes and statutes made with great and extreme punishment.] *Mitius imperanti melius paretur.*

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Seneca.

In which act five notable things are to be observed. First, it extendeth (without exception) to all high treasons made by any act of parliament since the said act of 25 E. 3. Secondly, to all declarations of high treasons by any act of parliament since the said act of 25 E. 3. (as of the said declaration in 3 R. 2. of killing an ambassadour and the like.) Thirdly, to all petit treasons made or declared by any act of parliament since the said act of 25 E. 3. Fourthly, albeit misprision of treason is not mentioned in the act of 25 E. 3. yet every misprision of any treason made or declared since that act by any act of parliament, is abrogated. Fifthly, no offence to be treason, petit treason, or misprision of treason, but only such as be declared and expressed to be treason, petit treason, or misprision of treason by the said act of 25 E. 3. Here three things are to be observed: first, that this word [expressed] excludeth all implications

implications or inferences whatsoever. Secondly, here misprision of treason is taken for concealment of high treason or petit treason, and only of high treason or petit treason specified and expressed in the act of 25 E. 3. Thirdly, that no former judgement, attainder, president, resolution, or opinion of judges or justices of high treason, petit treason, or misprision of treason, other then such as are specified and expressed in the said act of 25 E. 3. are to be followed or drawne to example: for the words be direct and plaine, [that from henceforth, no act, deed, or offence, &c. shall be taken, had, deemed, or adjudged to be treason, petit treason, or ^a misprision of treason, but only such as be declared and expressed in the said act of 25 E. 3. &c. any act of parliament or statute after 25 E. 3. or any other declaration or matter to the contrary notwithstanding.] So as there is no high treason, petit treason, or misprision of any treason made or declared by any act of parliament or otherwise since the act of 25 E. 3. but only such as have been made since the said act of 1 Mariæ, and of those only such as were made ^b perpetuall, and not during the life of queen Mary or of queen Elizabeth, whereof there be divers which now are expired, which you may reade being all in print. But there wanted nothing to the perfection of the statute of 25 E. 3. but a limitation of some certaine time wherein the offender should be accused.

^c *Post intervallum temporis accusator non erit audiendus, nisi docere potest se fuisse justis rationibus impeditum.*

Or the declaration of treason, &c. ^d Declarations made during the naturall life of queen Elizabeth ceased by her death: for declarations may have limitations as well as statutes introductory of new lawes.

There is another excellent branch of a statute made ^e in 1 & 2 Ph. & Mar. in these words. [And be it further enacted by the authority aforesaid, that all trials hereafter to be had, awarded, or made for any treason, shall be had and used only according to the due order and course of the common law.]

All trials. ^f Upon these words many things have been observed by others. First, that the letter of this act extendeth only to triall of high treasons, or petit treasons, and not to misprision. Secondly, foraine treasons are to be tried by the statute ^g of 35 H. 8. cap. 2. and so it was resolved by all the justices of England in Orurks case, and had been so resolved before. But for trials of treasons to be had in Wales, or where the kings writ runneth not, in such shires as the king shall assigne by his commission by the ^h statute of 32 H. 8. ca. 4. are abrogated by this act, because they are triable by the law.

ⁱ It hath been holden, that upon the triall of misprision of treason there must be two lawfull witnesses, as well upon the triall, as upon the indictment, as it was resolved by the justices in the lord Lumleyes case, Hil. 14. Eliz. reported by the lord Dier, under his own hand, which we have seen, but left out of the print, which for other purposes is cited hereafter. Thirdly, it hath been holden, that this act extendeth not to the indictment of any treason, but to the triall by peers, if the offender be noble: or by freeholders, if the offender be under the degree of nobility: and therefore upon the indictment which is in manner of an accusation, by the statutes of 1 E. 6. and 5 E. 6. two lawfull witnesses are requisite:

^a That is, of such treason, high or petit, as is expressed in the act of 25 E. 3. and of no other treason.

^b 1 Mar. cap. 6. 1 & 2 Ph. and Mar. cap. 11. 5 Eliz. ca. 1. and 11.

18 Eliz. cap. 1.

13 Eliz. cap. 2.

23 Eliz. cap. 1.

27 Eliz. cap. 2.

3 Jac. cap. 4.

^c Bracton, lib. 3. fol. 118. b.

^d 13 Eliz. cap. 1.

14 Eliz. cap. 1. and cap. 2.

^e 1 & 2 Ph. and M. cap. 10.

^f See the second part of the Institutes, Mag. Carta, cap. 29. Verbo (per judicium parium.)

^g 35 H. 8. cap. 2.

3 Mar. Dier, 132.

lib. 7. fol. 23. in

Calvin's case.

Pasch. 33 Eliz.

Orurk's case.

^h 32 H. 8. cap. 4.

ⁱ 1 E. 6. cap. 12.

5 E. 6. cap. 11.

Both which are mentioned in the next section.

Hill. 14 Eliz.

Dier, MS.

Nota. This is the last resolution of the judges in this point.

At this time Catlin and Dier were chief justices, and Sanders chiefe barron, &c.

1 E. 6. cap. 12.
5 E. 6. cap. 11.
See 13 El. cap. 1.
See before verb.
[De ceo provable-
ment soit attaint.]

quisite: the words of the statute of 1 E. 6. in the last branch be, [that none shall be indicted, arraigned, condemned, or convicted for any treason, petit treason, misprision of treason, or for any words before specified to be spoken, after the said first day of February, for which the same offender or speaker shall in any wise suffer pains of death, imprisonment, losse or forfeiture of his goods, chatels, lands, or tenements, unlesse he be accused by two sufficient and lawfull witnesses, or shall willingly without violence confesse the same.

Nota that [before specified] doe refer to the words mentioned before in the act. 1. It is manifest by the connexion of the words, viz. [for any words before specified to be spoken, &c.] 2. The treasons in 25 E. 3. were mentioned before. 3. The first words be [for any treason, petit treason, misprision of treason, &c.]

See 1 El. cap. 6.
Stanf. Pl. Coron.
89. and 164.
4 Mar. Coron.
Br. 220. Dier,
2 Mar. 99. and
3 Mar. 132.

* *Nota* the generality of these words.

Regula, verba generalia generaliter sunt intelligenda.

See hereafter
c. 49. of Piracy,
&c.

Hil. 14 El. Lo.
Lumley's case.
Ubi supra.
2 Mar. Dier, 99,
100. Thomas' case.

^a Mich. 13 &
14 El. Rolston's case.

^b 1 & 2 Ph. and
Mar. c. 11. supra.

And by 5 E. 6. ca. 11. it is provided by the last clause save one, [that none shall be indicted, arraigned, condemned, convicted, or attainted for any of the treasons or offences aforesaid, or for any * other treasons that now be, or hereafter shall be, which shall hereafter be perpetrated, committed, or done, unlesse the same offender be thereof accused by two lawfull accusers, &c. unlesse the said party arraigned shall willingly, without violence confesse the same.] Here two things are to be observed. 1. The particular penning of both these acts, viz. indicted, arraigned, convicted, &c. and the words of 1 & 2 of Ph. & Mar. extend to tryalls only, and not to the indictment. 2. Two lawfull accusers in the act of 5 E. 6. are taken for two lawfull witnesses, for by two lawfull accusers, and accused by two lawfull witnesses (as it is said 1 E. 6.) is all one: which word (accusers) was used, because two witnesses ought directly to accuse, that is, charge the prisoner, for other accusers have we none in the common law, and therefore lawfull accusers must be such accusers as law allow. And so was it resolved in the Lo. Lumleys case by the justices: for if accusers should not be so taken, then there must be two accusers, by 5 E. 6. and two witnesses by 1 E. 6. And the strange conceit in 2 Mar. that one may be an accuser by hearsay, was utterly denied by the justices in the Lo. Lumleys case. And this word (awarded) in the statute of 1 & 2 Ph. and Mar. extendeth to the tryall upon the arraignment, and not to the indictment, for that is not said to be awarded.

And it was resolved by all the justices in ^a Rolstons case upon the rebellion in the north, that these words [shall willingly without violence confesse the same] are to be understood where the party accused upon his examination before his arraignment, willingly confessed the same without violence, that is, willingly without any torture: and is not meant of a confession before the judge, for he is never present at any torture, neither upon his arraignment was ever any torture offered. And here commeth another ^b statute made in 1 & 2 Mar. to be considered, by which it is provided, that treason for the counterfeiting and impairing of the coin currant in this realm, &c. the offender therein, &c. shall be indicted, arraigned, tried, convicted, or attainted by such like evidence, and in such manner and form, as hath been used and accustomed within this realm, at any time before the first year of king E. 6. &c.

Wherein

Wherein the special penning of this act is to be observed, which in case of treason concerning the counterfeiting or impairing of coin, &c. hath by particular words restored the evidence requisite by the common law, before the statute of 1 E. 6. as well upon the indictment as the triall. But the act of 1 & 2 Ph. and Mar. cap. 10. extends to trials only in other cases of high treason, and therefore that act extendeth not to the indictment of other high treasons. Also it is most necessary (as many doe hold) that there should be two lawfull accusers, that is, two lawfull witnesses at the time of the indictment, for that it is commonly found in the absence of the party accused, and it may be when the party suspected is beyond sea, or in remote parts, and may be outlawed thereupon; and therefore seeing the indictment is the foundation of all, it is most necessary to have substantial proof in a cause so criminall, where *probationes oportent esse luce clariores*. Lastly, * if the indictment were part of the tryall, then ought he that is noble, and a lord of parliament be indicted of high treason, &c. by his peers: for the tryall of him (without question) must be by his peers: but the indictment of peers of the realm is always by free-holders, and not by their peers, as hereafter shall appear. We have been the longer herein in respect of some variety of opinion (for want of due and intire consideration had of all and every part of that which hath been said) upon serious study touching this point, without respect of a common wandring opinion.

And it seemeth that by the ancient common law one accuser, or witness was not sufficient to convict any person of high treason: ^a for in that case, where is but one accuser, it shall be tried before the constable and marshall by combat, as by many records appeareth. ^b But the constable and marshall have no jurisdiction to hold plea of any thing, which may be determined or discussed by the common law. And that two witnesses be required, appeareth by our ^c books, and I remember no authority in our books to the contrary: and the common law herein is grounded upon the law of God expressed both in the old and new Testament: ^d *in ore duorum aut trium testium peribit qui interficietur: nemo occidatur uno contra se dicente testimonium*.

And this seemeth to be the more clear in the triall by the peers, or nobles of the realm, because they come not *de aliquo vicineto*, whereby they might take notice of the fact in respect of *vicinitie*, as other jurors may doe.

Having now rehearsed what others have said and holden, we upon due consideration had of the whole matter will set down our own opinion, and reasons, in these four points following. First, that the statute of ^e 5 E. 6. cap. 11. is a generall law, and extends to all high treasons, as well by the common law declared by the statute of 25 E. 3. as to any other statute made or to be made, the negative words of which statute be: [no person shall be ^f indicted, arraigned, convicted, condemned, or attainted for any treason, that now is, or hereafter shall be, &c.] Which words without all question are generall, and so to be taken. The words of that statute be further, [unlesse the same offender be accused by two lawful accusers,] these two lawful accusers are in judgement of law taken for two lawful witnesses, and that for two causes: first, they must be lawful, that is, allowed by the laws of the realm: and by the law,
upon

1 & 2 Ph. and Mar. cap. 10.

* [26]

See Magna Cart. c. 29. and the exposition thereupon.

^a Pat. 25 E. 3. part 1. nu. 16. Rot. Parl. 21 R. 2. nu. 19. 21. the D. of Norff. case. Rot. Pat. 3 H. 4. Ballehul's case. Rot. Vascon.

⁹ H. 4. nu. 14. John Bolemer's case. Rot. Parl. 2 H. 6. nu. 9. the earl of Ormond's case.

Rot. Pat. 8 H. 6. pt. 2. m. 7. between Upton and Dowy.

Vide the 4. part of the Institutes. cap. the Court of Chivalry, &c. See Bract. lib. 3. fo. 119. a.

^b 13 R. 2. cap. 2. ^c Mirror, ca. 3 §. ordenance de attaint. Bract. l. 5. f. 354. 48 E. 3. 30. 35 H. 6. 46. Fort. ca. 32. 15 E. 4. f. 1. Pl. Com. fo. 8.

^d Deu. 17. 6. 19. 15 Mat. 18. 16. John 18. 23. 2 Cor. 13. 1. Heb. 10. 28.

^e And so I hold the statute of 1 E. 6. c. 12. to be a generall law, and to extend to all high treasons, &c.

^f Nota as well upon the indictment as the arraignment of treason there ought to be two accusers. See Dier, 2 & 3 Ph. and Mar. 132.

§ 1 E. 6. cap. 12.
the last clause.

5 El. cap. 1.

1 & 2 Ph. and

Mar. cap. 11.

Bract. li. 3. f. 118.

Qui accusat integre famæ sit, et non criminofus.

ⁱ Stat. de Kenelw. secunda parte, Vet. Mag. Cart. cap. 16.

^k See the first part of the Institutes. sect. 194. See Fortescue, cap. 26, 27.

Juries ought to be informed by evidences, and witnesses.

*[27]

^a 27 E. 3. cap. 8.

28 E. 3. cap. 18.

8 H. 6. cap. 29.

1 Mar. fo. 144.

Shirley's case, and so it was resolved by all the judges, Hil. 36 El. in the case of doctor Lopez, Emanuel Loyfie, and Stephen Ferreira de Gama.

^b 33 H. 8. c. 23.

3 Mar. Dier, 132.

Dier, 12 El. 286. b.

li. 11. fo. 63. a.

in doctor Foster's case.

^c 27 Aff. p. 1.

21 Aff. p. 12.

W. 1. c. 3. &c.

Mic. 25 & 26 El.

per les justices in

Somerville's and

Arden's case.

Dier 12 El. 286. b.

All this was re-

solved, Mic. 1 Ja.

in Sir Walter

Raleigh's case.

Pl. Com. 388.

Count de Lei-

cester's case.

upon the arraignment of the prisoner upon the indictment of treason, no other accuser can be heard, but witnesses only. Secondly, the words of the statute are [which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow, and maintain that which they have to say to prove him guilty of the treason, unlesse the party arraigned shall willingly without violence confesse the same,] as by that act it appeareth. Now to avow and maintain that which they have to say to prove him guilty of the treason, is the proper office and duty of witnesses, and so it is said in the statute of 1 E. 6. c. 12, in the last clause (by two lawful witnesses.) See the statute of 5 El. c. 1. where it is said [accused by good and sufficient testimony:] and to the same intent, the statute of 1 & 2 Ph. and Mariæ, cap. 11. for the word [accused.]

1. *Puniantur accusatores penes dominum regem, quod amodò rex eis de facili non credat: et talis pœna fiat eis, qualis debeat fieri illis, qui injuste fideles dni. regis exhaeredari et destrui fecerunt, &c.*

2. That this act of 5 E. 6. extend as well to petit treason, as high treason, for the words be [any treason] and so doth the statute of 1 E. 6. cap. 12.

3. That the statute of 1 & 2 Ph. and Mar. cap. 10. doth not abrogate the said act of 1 E. 6. or of 5 E. 6. For that act of 1 & 2 Ph. and Mar. extends only to trialls by the verdict of twelve men *de vicineto*, of the place where the offence is alleadged, and ^k the indictment is no part of the triall, but an information or declaration for the king, and the evidence of witnesses to the jury is no part of the triall, for by law the tryall in that case is not by witnesses, but by the verdict ^{*} of twelve men, and so a manifest diversity between the evidence to a jury, and a tryall by jury. And the word [awarded] in that statute doth prove that that act extended only to the *venire facias* for trial, for neither the indictment nor the evidence can be said to be awarded: *veritas quæ minime defensatur, opprimitur, et qui non improbat, approbat. Et sic liberè animam meam liberavi.*

^a The tryall against an aliennee, that lived here under the protection of the king, and amity being between both kings, for high treason, shall by force of this act of 1 & 2 Ph. & Mar. be tried according to the due course of the common law, and therefore in that case he shall not be tried *per medietatem linguæ*, as he shall be in case of petit treason, murder, and felony, if he prayeth it.

4. ^b That a tryall in a forein county upon examination before three of the councell, &c. by the statute of 33 H. 8. cap. 23. is abrogated by this act of 1 & 2 Ph. and Mar. being a tryall contrary to the due course of the common law, which is to have it tryed by jurours of the proper county, ^c but the indictment being found in the proper county, it may be by speciall commission heard and determined before commissioners in any forein county, but the tryall must be by jurours of the proper county; and this is warranted by the course of the common law. And albeit when the term begins, all commissions of oier and terminer in the county where the kings bench sit, be suspended during the term, yet if an indictment be found before such commissioners before the tearm, there may be a speciall commission made to commissioners in the same county, sitting the kings bench in that county, to

to hear and determine the same during the tearm: for the kings bench hath no power to proceed thereupon, till the indictment be before them. And it is the better, if the speciall commission bear teste after the beginning of the tearm. Note a diversity between generall commissions of oier and terminer, and such a speciall commission; and the court of kings bench may be adjourned, and in the mean time the commissioners may sit there.

^d And where it is provided by the statute of 33 H. 8. cap. 23. that peremptory challenge should not from thenceforth be admitted or allowed in cases of high treason, or misprision of treason: ^e this branch is abrogated by the said act of 1 Mar. For the end of challenge is to have an indifferent tryall, and which is required by law; and to bar the party indicted of his lawfull challenge, is to bar him of a principall matter concerning his tryall: and all acts of parliament concerning incidents to tryalls contrary to the course of the common law, are abrogated by the said words, [and that all trialls hereafter, &c.] but all this is to be understood of persons under the degree of nobility; for in case of a triall of a noble man, lord of parliament, he cannot challenge at all any of his peers.

^f Henry Garnet superiour of the jesuites in England upon his arraignment for the powder treason, did challenge Burrell a citizen of London peremptorily, and it was allowed unto him by the resolution of all the judges; ^g so as in case of high treason, or misprision of high treason, a man may challenge 35. peremptorily, which is under three juries, but more he cannot.

Lastly, all statutes made before the said act of 1 & 2 Ph. & Mar. for tryall of high treason, petit treason, or misprision of treason, contrary to the due course of the common law, are abrogated by the said act of 1 & 2 Ph. & Mar. and tryalls by the due course of the common law, with challenges incidents in those cases are restored.

^h If a man be indicted of high treason, he may at this day plead a foreign plea, as he might doe by the common law, and shall be tryed in the foreign county; but otherwise it is in cases of petit treason, murder, or felony, for there it shall be tryed in the county where the indictment is taken.

And forasmuch as the proceeding against a noble peer of the realm, being a lord of parliament in some points agrees, and in other points differeth from the proceeding against a subject under the degree of nobility: it shall be necessary to shew wherein they agree, and wherein they differ.

1. The noble peer of the realme must be indicted before commissioners of oier and terminer, or in the kings bench, if the treason, misprision of treason, felony, or misprision thereof be committed in that county where the kings bench sit, as it was resolved in the case of Tho. el. of N. in an. 13. Eliz. And this is common to both degrees to be indicted by jurors of that county where the offence was committed.

2. When he is indicted, then the king by his commission under the great seale constitutes some peer of the realme, to be *hac vice*, steward of England: for his stile in the commission, is, (*seneschallus Angliæ*) who is judge in this case of the treason or felony, or of the misprision of the same committed by any peer of the realm.

III. INST,

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^d 33 H. 8. c. 23.^e And so it was resolved, an. 1 Ja. in Sir Walter Raleighs case, by all the judges and had been resolved so before. Stan. pl. cor. 157.^f 3. Ja. R. in Garnets case. And so it was resolved, M. 25 & 26 El. in Somerviles and Ardens case.^g Br. tit. Challenge, 217.^h 22 H. 8. c. 14. 32 H. 8. c. 3. See 4 H. 8. c. 2. and 22 H. 8. c. 2. pleading, &c. for being taken out of sanctuary in a forain county in case of murder or felony. See hereafter, cap. Sanctuary, all sanctuaries taken away: and note that the stat. of 22 H. 8. &c. extend only to indictments and not to appeals.

[28]

1 H. 4. 1.

1 H. 4. 1.
10 E. 4. 6. b.
13 H. 8. 12.

This commission reciteth the indictment generally as it is found: and power given to the lord steward to receive the indictment, &c. and to proceed, *secundum legem et consuetudinem Angliæ*. And a commandement is given thereby to the peers of the realme, to be attendant and obedient to him: and a commandement to the lieutenant of the Tower to bring the prisoner before him.

3. A *certiorari* is awarded out of the chancery to remove the indictment it selfe before the steward of England *indilatè*, which may either beare date the same day of the stewards commission, or any day after.

4. The steward directs his precept under his seale to the commissioners, &c. to certifie the indictment such a day and place.

5. Another writ goeth out of the chancery directed to the lieutenant of the Tower, to bring the body of the prisoner before the steward at such day and place as he shall appoint.

6. The lord steward maketh a precept under his seale to the lieutenant of the Tower, &c. and therein expresseth a day and place when he shall bring the prisoner before him.

7. The steward maketh another precept under his seale to a serjeant at armes, to summon *tot et tales dominos, magnates, et proceres hujus regni Angliæ prædicti R. comitis E. pares, per quos rei veritas melius sciri poterit, quod ipsi personaliter compareant coram prædicto seneschallo apud Westm. tali die et hora, ad faciend. ea quæ ex parte domini regis forent faciendâ, &c.* Wherein four things are to be observed. First, that all these precepts most commonly beare date all in one day. Secondly, that no number of peers are named in the precept, and yet there must be twelve or above. Thirdly, that the precept is awarded for the returne of the peers before any arraignment or plea pleaded by the prisoner. Fourthly, that in this case the lords are not *de vicineto*, and therefore the sitting and triall may be in any county of England. And herein are great differences between the case of a peer of the realme, and of one under the degree of nobility.

8. At the day, the steward with six serjeants at armes before him takes his place under a cloth of estate, and then the clerk of the crown delivereth unto him his commission, who redelivereth the same unto him. And the clerk of the crown causeth a serjeant at armes to make three oyes, and commandement given in the name of the lord high steward of England to keep silence: and then is the commission read. And then the usher delivereth to the steward a white rod, who re-delivereth the same to him againe, who holdeth it before the steward. Then another oyes is made, and commandement given in the name of the high steward of England, to all justices and commissioners to certifie all indictments and records, &c. Which being delivered into court, the clerk of the crown readeth the return. Another oyes is made, that the lieutenant of the Tower, &c. returne his writ and precept, and to bring the prisoner to the bar: which being done, the clerk reads the returne. Another oyes is made, that the serjeant at armes return his precept with names of the barons and peers by him summoned, and the return of that is also read. Another oyes is made, that all earles, barons and peers (which by the commandement of the high steward be summoned) answer to their names, and then they take their places and sit down, and their names are recorded: and the entry of the record is, that they

1 H. 4. 1.

1 H. 4. 1.

they appear, *ad faciendum ea quæ ex parte domini regis eis injunguntur*. And when they be all in their places, and the prisoner at the bar, the high steward declares to the prisoner the cause of their assembly, and perswades him to answer without feare, that he shall be heard with patience, and that justice shall be done. Then the clerk of the crown reads the indictment, and proceeds to the arraignment of the prisoner, and if he plead not guilty, the entry is, *et de hoc de bono et malo ponit se super pares suos, &c.* Then the high steward giveth a charge to the peers, exhorting them to try the prisoner indifferently according to their evidence.

9. The peers are not sworn, but are charged, *super fidelitatibus, et ligeantiis domino regi debitis*: for so the record speaketh.

10. Then the kings learned councill give evidence, and produce their proofes for the king against the prisoner.

11. But the prisoner, when he pleadeth not guilty, whereby he denieth the fact, he needs have no advice of councill to that plea. But if he hath any matter of law to plead, as Humfrey Stafford in 1 H. 7. had, viz. The priviledge of sanctuary, he shall have councill assigned to him to plead the same, or any other matter in law: as to plead the generall pardon, or a particular pardon, or the like. And after the plea of not guilty, the prisoner can have no councill learned assigned to him to answer the king's councill learned, nor to defend him. And the reason thereof is, not because it concerneth matter of fact, for *ex facto jus oritur*: but the true reasons of the law in this case are: First, that the testimonies and the proofs of the offence ought to be so clear and manifest, as there can be no defence of it. * Secondly, the court ought to be in stead of councill for the prisoner, to see that nothing be urged against him contrary to law and right; nay, any learned man that is present may inform the court for the benefit of the prisoner, of any thing that may make the proceedings erroneous. And herein there is no diversity between the peer and another subject. And to the end that the triall may be the more indifferent, seeing that the safety of the prisoner consisteth in the indifferency of the court, the judges ought not to deliver their opinions before-hand of any criminall case, that may come before them judicially. And we reade, that in the case of Humfrey Stafford that arch-traytor, Hussey chief justice, besought king Henry the seventh, that he would not desire to know their opinions before-hand for Humfrey Stafford, for they thought it should come before them in the kings bench judicially, and then they would do that which of right they ought: and the king accepted of it. And therefore the judges ought not to deliver their opinions before-hand upon a case put, and proofs urged of one side in absence of the party accused: especially in cases of high nature, and which deserve so fatall and extreme punishment. For how can they be indifferent, who have delivered their opinions before-hand without hearing of the party, when a small addition, or subtraction may alter the case: And how doth it stand with their oath, who are sworn, That they should well and lawfully serve our lord the king and his people in the office of a justice? and they should do equall law, and execution of right to all his subjects, &c. See more of this matter in the 13 section here following.

12. There be alwayes either all, or some of the judges ever atten-

1 H. 4. 1.

In Scotland in all criminall cases, yea in cases of high treason, *pars rea* may have councill learned.

Vide hereafter upon the statute of 31 Eliz. concerning witnesses.

*See more hereof cap. 63. Councill learned in Pleas of the Crown.

1 H. 7. fo. 26.

18 E. 3.

dant upon the high steward, and sit at the feet of the peers, or about a table in the middest, or in some other convenient place.

13. After all the evidence given for the king, and the prisoners answers, and proofs at large, and with patience heard: then is the prisoner withdrawn from the bar to some private place under the custody of the lieutenant, &c. And after that he is withdrawn, the lords that are tryers of the prisoner go to some place to consider of their evidence: and if upon debate thereof, they should doubt of any matter, and thereupon send to the high steward, to have conference with the judges, or with the high steward, they ought to have no conference, either with the judges or the high steward, but openly in court, and in the presence, and hearing of the prisoner; as it was resolved by all the justices of England in the reign of king H. 8. in the case of the lord Dacres of the North. And this was a just resolution; for when the lords should put a case, and ask advice thereupon, the prisoner ought by law to be present, to see that the case or question be rightly put: and therefore that nothing be done in his absence, untill they be agreed on their verdict. Hereupon it followeth, that if the peers of the realm, who are intended to be indifferent, can have no conference with the judges, or with the high steward in open court in the absence of the prisoner: *à fortiori*, the king's learned counsell should not in the absence of the party accused, upon any case put, or matter shewed by them, privately preoccupate the opinion of the judges; and upon so just a resolution the case succeeded well, for the peers found the lord Dacres not guilty.

14. A noble man cannot waive his triall by his peers, and put himselfe upon the triall of the country, that is, of twelve freeholders: for the statute of Magna Carta is, that he must be tried *per pares*. And so it was resolved in the lord Dacres case, *ubi supra*.

15. * The peers ought to continue together (as juries in case of other subjects ought to do) until they be agreed of their verdict: and when they are agreed, they all come again into the court, and take their places, and then the lord high steward publicly in open court, beginning with the puisne lord, (who in the case of the lord Dacre was the lord Mordant,) said unto him; My lord Mordant, is William lord Dacre guilty of the treasons, whereof he hath been indicted or arraigned, or of any of them? And the lord standing up said, Not guilty: and so upward of all the other lords *seriatim*: who all gave the same verdict: In which case the entry is, *super quo W. Comes E. & cæteri antedicti pares instanter super fidelitatibus & legeantiis dicto domino regi debitis, per præfatum senescallum ab inferiori parte usq; ad supremum separatim publice examinati dicunt quòd W. dominus Dacre non est culp.* &c.

16. The peers give their verdict in the absence of the prisoner, and then is the prisoner brought to the bar again: and then doth the lord steward acquaint the prisoner with the verdict of his peers, and give judgement accordingly, either of condemnation or acquittall. But it is not so in the case of another subject: for there the verdict is given in his presence.

17. Every lord of parliament, and that hath voice in parliament, and called thereunto by the king's writ, shall not be tried by his peers, but only such as sit there *ratione nobilitatis*, as dukes, marquisses,

[30]

Pasch. 26 H. 8.
in the case of the
lord Dacres of
the North, re-
ported by justice
Spilman, which
we have seen.

Mag. Cart.
cap. 29.

* Resolved by
all the judges.
Mich. 13 & 14
El. in the case of
Tho. duke of
Norff.
1 H. 4. fo. 1.
10 E. 4. 6. b.
13 H. 8. fo. 12.
Tr. 26 H. 8.
Spilman's re-
port.

Rot. Roman.
17 E. 2. m. 6.
Adam Orleton
B. of Hereford.

marquisses, countes, viscounts or barons, and not such as are lords of parliament, *ratione baroniarum, quas tenent in jure ecclesiæ*, by reason of their baronies which they hold in the right of the church, as arch-bishops, and bishops, and in time past some abbots and priors, but they shall be tried by the countrey, that is, by freeholders, for that they are not of the degree of nobility.

18. ^a No noble man shall be tried by his peers, but only at the suit of the king upon an indictment of high treason, or misprision of the same, petit treason, murder, or other felony, or misprision of the same. But in case of a premunire or the like, though it be at the suit of the king, he shall not be tried by his peers, but by freeholders. And so in an appeale at the suit of the party for petit treason, murder, robbery, or other felony, he shall be tryed by freeholders. See more hereof in the second part of the Institutes, Magna Carta, cap. 29.

19. ^b And albeit a man be noble, and yet no lord of the parliament of this realm, (as if he be a nobleman of Scotland, or of Ireland, of France, &c.) he shall be tried by knights, esquires, or others of the commons. And so it is of the sonne of a duke, marquisse, earle, &c. he is noble, and called lord: and yet because he is no lord of parliament, he shall be tried as one under the degree of a peer, and lord of parliament.

20. No peer of the realm, or any other subject shall be convicted by verdict, but the said offences must be found by above four and twenty, viz. by twelve, or above, at his indictment, or by twelve peers, or above, if he be noble, and by twelve, and not above, if he be under the degree of nobility.

21. A peer of the realme being indicted of treason, or felony, or of misprision, as is aforesaid, and duly transmitted to the lords, may be arraigned thereof in the upper house of parliament, as frequently in parliament rolls it doth appeare: but then there must be appointed a steward of England, who shall put him to answer: and if he plead not guilty, he shall be tried *per pares suos*, and then the lords spiritual must withdraw, and make their proxies: but no appeal of treason can be in parliament, ^a but is ousted by the statute of 1. H. 4. cap. 14.

22. ^b And as the beginning (viz. the finding of the indictment by freeholders) is equall to them both: so the most extreme and heavy judgement, if they be found guilty, is equal to both, &c. which you may reade in the first part of the Institutes, Sect. 147.

23. ^c And though the commission of the lord steward be only in these latter times *hac vice*, yet may the same be adjourned, as other commissioners *hac vice* may. And so it was holden in the lord Dacres case. And so it was done by the steward of England in the case of R. earle of S. and of F. his wife, who adjourned his commission until the next day.

24. If execution be not done according to the judgement, then the high steward in the case of a peer of the realm, or the court or commissioners in case of another subject, may by their precepts under their seales command execution to be done according to the judgement: but in case of high treason, if all the rest of the judgement (saving the beheading, which is part of the judgement) be pardoned, this ought to be under the great seale of England.

2 H. 4. Marks.
B. of Carlisle.
Stanf. Pl. Coron.
li. 3. ca. 62. fo.
153. in Temps
H. 8.

^a 10 E. 4. 6. b.
Mag. Cart. c. 29.

^b 11 E. 3. bre.
473.
8 R. 2. proces.
pl. ultimo.
20 E. 4. 6.
20 El. Dier, 360.
38 H. 8. Br.
treason. Seignior
Sanctus case.
Lib. 9. fo. 117.

[31]

10 E. 4. 6.
Rot. par. 21. R.
2. Countee de
Arundels case.
Rot. Parliam.
5 H. 4. nu. 11,
12. 31 H. 6. nu.
49. Countee de
Devons case.
28 H. 6. nu. 19.
Duke of Suff.

^a 1 H. 4. cap. 14.
^b 1 H. 4. 1.
Stanf. Pl. Co-
ron. 182. E. K.
See hereafter.
cap. Judgement
and Execution.

^c Pasch. 26 H.
8. ubi supra.
L. 5 E. 4. 33.
12 H. 4. 20.

25. And when the service is performed, then is an oyes made for the dissolving of the commission; and then is the white rod, which hath been borne and holden before the steward, by him taken in both his hands, and broken over his head.

Lastly, the indictments together with the record of the arraignment, triall, and judgement, shall be delivered into the king's bench, there to be kept and inrolled.

Hitherto we have spoken when a noble man doth appear, and plead not guilty, and put himself upon his peers: Now let us see what shall be had against him when he is indicted and appears not, and cannot be taken: and generally he shall be outlawed, *per judicium coronatorum*. But how doth that stand with Magna Charta, *nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum*? That is to be intended, when he appears and pleads not guilty, and puts himself upon his peers: but when he absents himself, and will not yeild himself to the due tryall of his peers, then he shall be outlawed *per judicium coronatorum*, or else he should take advantage of his own contumacy, and flying from judgement. ^a For proces to be awarded upon the indictment or appeal of treason, felony, or trespass, either against a nobleman or any other, see the statute of 6 H. 6. and 8 H. 6. and if the proces and order prescribed by those statutes be not pursued, the outlawry may be reversed by writ of error, which writ ought to be granted to him *ex merito justitiæ*, as it was adjudged in Ninian Menvils case: and those statutes doe extend as well to the kings bench, as to other courts having by commission power to hear and determine the same, and very few outlawries of treason or felony, are of force and validity in law, for that these acts are not pursued.

And these acts are well expounded by our * books, and therefore they shall not need to be recited at large. This is necessary to be added, that the opinion of Stanf. Pl. Cor. 182. l. upon the statute of 33 H. 8. c. 20. is, where the attainder is not erroneous, but lawfull by the course of the law: and so it was resolved, Tr. 28 Eliz. and thereupon ^e the statute of 28 Eliz. ca. 2. was made, that no attainder that then was for any high treason should be reversed for error where the party was executed. But that act extendeth only to attainders before that act, and where the party attainted suffered pains of death, as hath been said.

But admitting the proces be awarded according to these statutes, and the truth is, that the party indicted of high treason (be he noble or other) at the time of the outlawry pronounced, is out of the realm, &c. whether may he avoid the same by writ of error? The answer is, that he might have avoided the same by writ of error at the common law: but now in case of high treason he is barred of his writ of error by the statutes of 26 H. 8. and 5 E. 6. which statutes are expounded to extend generally to all treasons, but those statutes extend not to any other offence than high treason only, and therefore all other offences remain as they did at the common law for that point.

Now for that all indictments for any offence whatsoever, as well of noblemen, as of any under the degree of nobility, ought by the common law of the realm to be by persons duly returned, and by * lawfull liege people, indifferent as they stand unsworn, and without any denomination of any: a good and profitable law

was

Mag. Cart.

ca. 29.

^d See hereafter in the chapter of Judgement and Execution concerning reversing of outlawries. 6 H. 6. c. 1. 8 H. 6. ca. 10. Mich. 26 and 27 Eliz. in bre. de error coram Rege in Ninian Menvills case. Utlary de haut treason reverse in bank le roy.

* 19 H. 6. fo.

1. 2. 11 H. 6.

54. 1 E. 4. 1.

30 H. 6. proces.

192. 31 H. 6.

11. Vide F. N.

B. 115. l.

Li. Intr. R. f.

122. Stanf. Pl.

cor. 68, 69.

182 l.

^e 28 El. ca. 2.

[32]

See the first part of the Insti. sect.

26 H. 8. cap. 13.

5 E. 6. cap. 11.

12 El. Dier 287.

* Artic. sup.

cart. cap. 9. 28

E. 1. 20 E. 3.

cap. 6. 34 E. 3.

c. 4. 42 E. 3. c.

11. Regitt. 178.

Rast. pl. 117.

* was made in that behalf at the parliament holden 11 H. 4. in these words. *Item* because that now of late ^a inquests were taken at Westm' of persons named to the ^b justices, without due return of the sherif, of which persons some were ^c outlawed before the said justices of record, and some fled to sanctuary for treason, and some for felony, there to have refuge; by whom as well many offenders were indicted, as other lawfull liege people of our lord the king, not guilty by conspiracy, abetment, and false imagination of other persons for their speciall advantage and singular lucre, against the course of the common law used and accustomed before this time. Our said lord the king for the greater ease and quietnesse of his people, will and granteth, that the same indictment so made, with all the dependance thereof be ^d revoked, adnulled, void, and holden for none for ever. And that from henceforth no indictment be made by any such persons, but by enquest of the king's lawfull ^e liege people, in the manner, as was used in the time of his noble progenitors, returned by the sherifs, or baylifs of franchises, without any ^f denomination to the sherifs, or baylifs of franchises before made by any person of the names, which by him should be impanelled, except it be by the officers of the said sherifs or baylifs of franchises sworn and known to make the same, ^g and other officers to whom it pertaineth to make the same according to the law of England. And if any indictment be made hereafter in any point to the contrary, that the same indictment be also void, revoked, and for ever holden for none.

The body of this act consisteth upon two distinct purviens or branches, the one to remedy a mischief past, the other to provide for the time to come. The first branch consisteth of a preamble, and a purvien: and the preamble containeth these eight parts. First, it sheweth divers inquests had been taken at Westminster by persons named to the justices. Secondly, without due return of the sherif. Thirdly, of which some were outlawed before the said justices of record. Fourthly, some fled to sanctuary for treason, and some for felony. Fifthly, by whom many offenders were indicted. Sixthly, some not guilty. Seventhly, by conspiracy, &c. Eighthly, that all this was against the course of the common law. By the body of the act, it is enacted that the same indictment, with all the dependance thereof, be revoked, and made void. Then followeth the second branch or purvien for the time to come, and this purvien consisteth of divers parts: First, in describing by what persons indictments ought to be found, and therein 1. *privative*, that is, not by any such persons, having reference to the preamble, which persons we have before particularly distinguished. 2. *Positive*, that all indictments must be found by persons of these qualities. 1. They must be the kings lawfull liege people. 2. Returned by sherifs, or baylifs of franchises, and other officers to whom it pertaineth. 3. Without any denomination to the sherifs, baylifs, or other officers: and this purvien is in affirmance, and declaratory of the common law.

The second part of the purvien is introductory of a new law, viz. that if any indictment be made hereafter in any point to the contrary, that the same indictment be void, revoked, and holden for none. Wherein these two things are to be observed: 1. That this is a generall law, and extendeth to all indictments for any crime, de-

- * 11 H. 4. ca. 9.
- ^a Stanf. pl. cor. 87. e.
- ^b Rot Parl. 11. H. 4. nu. 15. in the kings bench.
- ^c Vid. 11 H. 4. fo. 41.
- 21 H. 6. 30.
- 9 E. 4. 16.
- 3 H. 6. 55.
- 26 Aff. 28.
- ^d 11 H. 4. 41.
- ^e 14 H. 4. 19.
- ^f 21 E. 3. 5.
- 15 E. 3. chal.
- 113. 27 Aff. pa. 65. 28 Aff. 24.
- 22. 49 E. 3. 1.
- 49 Aff. 1. 28.
- 43 E. 3. chall.
- 94. 6 R. 2. chall.
- 102. 7 H. 4. 10.
- 21 E. 4. 74.
- 19 H. 6. 9.
- 21 H. 6. 22.
- 14 H. 7. 1.
- ^g Nota.

47 E. 3. 1.
7 H. 4. 10.
21 E. 4. 74.

3 H. 8. ca. 12.

fault, or offence whatsoever: for the words be [if any indictment] generally without naming of any court, or before whom. 2. If the indictment be found by any persons that are outlawed, or not the kings lawfull liege people, or not lawfully returned, or denominated by any, viz. by all or any of these, that then the indictment is void, for the words be, [if any indictment be made hereafter in any point to the contrary, &c.] Upon this statute in the case of Robert Scarlet before the justices of assize at Bury in the county of Suffolk, in sommer vacation, 10 Ja. R. these points were resolved and adjudged: First, where at the sessions of the peace holden at Woodbridge in the said county of Suffolk, Robert Scarlet by confederacy between him and the clerk, that was to read the pannell of the grand jury returned by the sherif, (whereof he was none, albeit he laboured the sherif to have returned him) that the clerk should read him as one of the pannell, which was done accordingly, and he sworn. It was resolved and adjudged that this case was within the statute, for that he was not returned by the sherif. Secondly, that where the rest of the great inquest giving faith to him indicted seventeen honest and good men upon divers penall statutes, which was done by the said Robert Scarlet maliciously. It was resolved and adjudged, that albeit he * alone was sworn without the return of the sherif, and all the rest duly returned, yet this case was within this statute, and all the indictments found by him and the rest were void by this statute: for hereby it appeared what mischief such a one might doe. Thirdly, that Robert Scarlet upon this case had offended against the said act, and might be indicted thereupon: and accordingly he was upon sufficient proof of the fact, as aforesaid, indicted upon the said act, and pleaded not guilty, and was found guilty. Fourthly, that this act extended not only to indictments of treason and felony, but of all other offences and defaults whatsoever, according to the generality of the words. Fifthly, consideration was had of the act of 3 H. 8. cap. 12. and resolved clearly that this statute had not altered the act of 11 H. 4. in any thing concerning the offence of Scarlet, as upon that, which shall be said of the act of 3 H. 8. shall appear. And upon hearing of counsell learned what they could say in arrest of judgement, at last judgement was given, that he should be fined and imprisoned, and ordered by the court that no proces should goe out upon the said indictments found by the said great inquest, whereof Scarlet was one.

But notwithstanding this good law, through the subtilty, and untrue demeanor of sherifs, and their ministers, great extortions and oppressions be and have been committed and done to many of the kings subjects by means of returning at sessions holden within counties and shires for the body of the shire, the names of such persons as for the singular advantage, &c. of the said sherifs and their ministers, will be wilfully forsworn and perjured by the sinister labour of the said sherifs and their ministers, by reason whereof many substantial persons, the king's true subjects have been wrongfully indicted of murders, felonies, and misdemeanours: and sometime by labour of the said sherifs and their ministers, divers great felonies and murders have been concealed, &c. For remedy of which mischiefs it is enacted by the said statute of 3 H. 8. cap. 12. That the justices of gaol delivery, or justices of peace, whereof

whereof one to be of the quorum, in their open sessions may reform the panell returned by the sherif to inquire for the king, by putting to and taking out the names of the persons so impanelled by the discretion of the said justices, &c. and that the sherif shall return the panells so reformed. This act extends only to justices of gaol delivery, and of the peace: the body of the act for offences is generall and evident. *Vide* 11 H. 7. cap. 24.

Vid. 11. H. 7.
ca. 24.

Nota Lector, that the aforesaid parliament of 11 H. 4. begun in *quindena Hillarii*, anno 11 H. 4. and the same term, viz. Hil. 11 H. 4. fo. 41. it was according to the said act of 11 H. 4. resolved by Gascoign chief justice, and all the rest of the justices, that an indictment of felony found by an inquest before 5 H. 4. whereof one was outlawed of felony, and another was acquitted by the generall pardon, so as they were not *probi et legales homines* to enquire as the law willeth, and after the party had pleaded not guilty to the felony, it was awarded, that all the indictments by them found, were annulled and made void. Herewith agreeth Stanford in his pleas of the crown, fo. 87. and 88. *Vide* F. tit. Indictment 25. and Coron. 89. and Brook tit. Indictment 2. Note the act saith, that they were outlawed before themselves, so as the court may take knowledge thereof of themselves, or of any other, as *amicus curiæ*: but the safest way for the party indicted is to plead, upon his arraignment, the speciall matter given unto him by the statute of 11 H. 4. for the overthrow of the indictment, with such averments, as by law are required, (agreeable to the opinion of the Lord Brook. *Ubi supra.*) and to plead over to the felony, and to require counsell learned for the pleading thereof, which ought to be granted, and also to require a copy of so much of the indictment, as shall be necessary for the framing of his plea, which also ought to be granted. And these laws made for indifferency of indicters, ought to be construed favourably, for that the indictment is commonly found in the absence of the party, and yet it is the foundation of all the rest of the proceeding.

Hil. 11 H. 4.
f. 41.

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Stanf. Pl. cor.
87, 88. F. tit.
Indictment 25.
and Coron. 89.
Br. tit. indict. 2.

Vid. le statutes
de 1 R. 3. ca. 4.
33 H. 6. c. 2.
W. 2. ca. 13.
1 E. 3. stat. 2.
ca. 17.

All tending that
indictments may
be duly had.

Dier 3 Mar.
131, 132.
Stanf. pl. cor.
90. 35 H. 8.
ca. 2.

* Mich. 35 &
36 El. in the case
of Francis Dacres.

5 El. cap. 1.

Mich. 6 & 7 El.
Dier fo. 234.
Bonner's case.

To draw to an end concerning tryals: it is regularly true, that by the common law the tryall shall be in the county, where the indictment is taken: and by the aforesaid act of 35 H. 8. treasons and misprisions of treasons committed or done out of the realm, &c. shall be enquired of, heard, and determined before the justices of the king's bench, &c. Now the case fell out upon this statute to be thus: * one was indicted before the justices of the kings bench, at the term holden at Hertford, by a jury of the county of Hertford, for divers high treasons committed out of this realm, and after the term was adjourned to Westm. in the county of Midd. The question was, by which of the counties the party indicted should be tried: and it was resolved, that he should be tried by men of that county where the indictment was taken. But otherwise it is upon the statute of 5 El. ca. 1. the case being, that Horn bishop of Winch. tendred to Edmond Bonner late bishop of London, in the county of Surrey, within his dioces the oath of supremacy according to the act 1 Eliz. which Bonner refused, and this was certified by the bishop of Winch. into the kings bench, then sitting at Westminster in the county of Midd. Now, by the statute of 5 El. he that refuseth the oath is to be indicted of a premunire by a jury of Midd. as a jury of that county might doe for any offence done in

that

that county, and extendeth only to the indictment, where the words of the act of 35 H. 8. be, [shal be enquired of, heard, and determined,] the question upon the statute of 5 Eliz. was, if Bonner should appear and plead not guilty, by what county he should be tried, whether by a jury of Midd. where the indictment was, or by a jury of Surrey, where the offence was committed; and resolved that he should be tried by a jury of Surrey: for the statute of 5 El. extendeth to the indictment only, and leaveth the triall to the common law, which appointeth the tryall to be, where the offence is committed, and so a manifest diversity between the two cases: for regularly by the common law in all pleas of the crown, *debet quis juri subjacere, ubi deliquit.*

It is now necessary to be known, how prisoners (to speak once for all) committed for treason, or any other offence ought to be demeaned in prison. Bracton saith, *solent præfides in carcere continendos dammare, ut in vinculis contineantur, sed hujusmodi interdicta sunt à lege, quia carcer ad continendos, non ad puniendos haberi debeat:* And in another place he saith, *Cum autem taliter captus coram justic. est producendus, produci non debet ligatis manibus, (quamvis interdum gestans compedes propter evasionis periculum,) et hoc ideo, ne videatur coactus ad aliquam purgationem suscipiendam.*

^a If felons come in judgement to answer, &c. they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will. ^b And in another place he saith, and of prisoners we will that none shall be put in irons, but those †, which shall be taken for felony, or trespass in parks or vivaries, or which be found in arerages upon account, and we defend that otherwise they shall not be punished nor tormented. ^c *Omnes autem attachiabiles licet vicecomiti in prisona custodire, &c. non tamen ad puniend', sed ad custodiend', &c.* ^d It is an abuse that prisoners be charged with irons, or put to any pain before they be attainted.

^e *Quidam sacerdos arraniatus de feloniam posuit se super patriam, & stetit ad barram in ferris, sed per præceptum justic. liberatur à ferris.* And there is no difference in law, as to a priest and a lay man, as to irons.

^f *Presentat quod ubi quidam Robertus Bayhens de Tanesby captus fuit, & in prisona castri Lincoln detentus pro quodam debito statut. mercatorii in custodia Tho. Boteler constabularii castride Lincoln ibi præd. Tho. le Boteler posuit ipsum Robertum in profundo gaole inter lenones in vili prisona contra * formam statut. &c. et eodem profundo detinuit, quousque idem Robertus fecit finem cum eo de 40 s. quos ei solvit per extortionem.*

So as hereby it appeareth, that where the law requireth that a prisoner should be kept in *salva & arcta custodia*, yet that that must be without pain or torment to the prisoner.

Hereupon two questions do arise, when and by whom the rack or brake in the Tower was brought in.

To the first, John Holland earl of Huntingdon, was by king H. 6. created duke of Exeter, and anno 26 H. 6. the king granted to him the office of the constablership of the Tower: he and William de la Poole duke of Suffolk, and others, intended to have brought in the civill lawes. For a beginning whereof, the duke of Exeter being constable of the Tower first brought into the Tower the

Bract. lib. 3.
fo. 154. b.
*Vincula qui sensit,
didicit succurrere
vinetis.*
Bract. lib. 3. fo.
105. a.
Stanford 78.
Bract. li. 3. f.
137. Note Shac-
kells about the
feet ought not to
be, but for fear
of escape.
Mirror, c. 2.
§. 9.
^a Brit. c. 5.
fo. 14.
^b Cap. 11. fo. 17.
W. 2. c. 1. after
judgement.
Lib. 3. fo. 44.
Lib. 8. fo. 100.
24 H. 8. Dier.
249.
Pl. Com. 360. a.
^c Fleta li. 1. ca.
26.
^d Mirror c. 5. §. 1.
^e 8 E. 2. cor.
432.
^f Tr. 7 E. 3. co-
ram rege Rot. 44.

† [35]

* 1 E. 3. c. 7.

Tortures, the
rack, &c.

Rot. Pat.
26 H. 6.

Rot. Parl.
26 H. 6. nu. 30.

the rack or brake allowed in many cases by the civil law: and thereupon the rack is called the duke of Exeter's daughter, because he first brought it thither.

To the second upon this occasion, Sir John Fortescue chiefe justice of England, wrote his book in commendation of the lawes of England, and therein preferreth the same for the government of this countrey before the civill law; and particularly that all tortures and torments of parties accused were directly against the common lawes of England, and shewed the inconvenience thereof by fearfull example, to whom I refer you being worthy your reading. So as there is no law to warrant tortures in this land, nor can they be justified by any prescription being so lately brought in.

And the poet in describing the iniquity of Radamanthus, that cruell judge of hell, saith,

Castigatque, auditque dolos, subigitque fateri.

First, he punished before he heard, and when he had heard his deniall, he compelled the party accused by torture to confesse it. But far otherwise doth Almighty God proceed *postquam reus diffamatus est. 1. Vocat. 2. Interrogat. 3. Judicat.* To conclude this point, it is against Magna Carta, cap: 29. *Nullus liber homo, &c. aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, aut per legem terræ.* And accordingly all the said ancient authors are against any paine, or torment to be put or inflicted upon the prisoner before attainder, nor after attainder, but according to the judgement. And there is no one opinion in our books, or judicall record (that we have seen and remember) for the maintenance of tortures or torments, &c.

And now, to conclude this chapter of treason. It appeareth in the holy scripture, that traytors never prospered, what good soever they pretended, but were most severely and exemplarily punished: As ^a Corah, Dathan, and Abiram, by miracle: *dirupta est terra sub pedibus eorum, et aperiens os suum devoravit illos, &c.* ^b Athalia the daughter of Amri, *interfecta est gladio.* ^c Bagatha and Thara against Assuerus, *appensus est uterq; eorum in patibula.* ^d Absolon against David. *Suspensus in arbore, et Joab infixit tres lanceas in corde ejus.* ^e Achitophel with Absolon against David. *Suspendio interiit,* he hanged himselfe. ^f Abiathar the traiterous high priest against Solomon. *Abiathar sacerdoti dixit rex, &c. Et quidem vir mortis es, sed hodie te non interficiam, &c. Ejecit ergo Solomon Abiathar, ut non esset sacerdos.* ^g Shemei against David, *gladio interfectus.* ^h Zimri against Ela, who burnt himselfe. ⁱ Theudas (*qui occisus est, et circiter 400 qui credebant ei, dispersi sunt et redacti ad nihilum*) and Judas Galilæus, *ipse periit, et omnes quotquot consenserunt ei, dispersi sunt.* Lastly, ^k Judas Iscariot, *secundum nomen ejus vir occisionis,* the traytor of traytors. *Et hic quidem possedit agrum de mercede iniquitatis suæ, & suspensus crepuit medius, et diffusa sunt omnia viscera ejus.*

Peruse over all our books, records, and histories, and you shall finde a principle in law, a rule in reason, and a trial in experience, that treason doth ever produce fatal and final destruction to the offender, and never attaineth to the desired end, (two incidents inseparable thereunto.) * And therefore let all men abandon it, as the most poisonous bait of the devill of Hell, and follow the precept in

holy

Hollenshed,
pa. 670. &c.
Innocentem co-
git mentiri dolor.
Fortescue. ca.
22. fo. 24.

Virgil.

Luke 16. 1, 2.
&c. John 7. 51.
Nunquid lex
nostra judicat
hominem nisi
prius audierit ab
ipso?

Proditor illudit
verbis, dum ver-
bera cudit.

^a Numb. 16. 31,
32. & 27. 3.
^b 2 Regum, 11.
16.
^c Esth. 12. 2, 3.
^d 2 Sam. 18. 9.
14.
^e 2 Sam. 17. 23.

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^f 1 Reg. 2. 26, 27.
^g 2. Sam. 16.
5, 6. 1 Reg. 2.
8. &c. 46.
^h 1 Regum 16.
9. &c. 18.
ⁱ Act. Apost. 5.
36, 37.
^k Act. Apost. 1.
18. Math. 27. 5.
laqueo se suspen-
dit. Qui molitur
insidias in patri-
am, id facit quod
insanus nauta per-
forans navem in
qua ipse vebitur.
* Felix quem fa-
ciunt aliena peri-
cula cautum.
Prov. 24. 21.

holy scripture, Fear God, honour the king, and have no company with the sedicious.

See more of treason in the next chapter of Misprision, &c. and in Principall and Accessory, in the title of Judgement and Execution: and the chapter of *Monomachia*, Single Combat, &c. the residue of this act of 25 E. 3.

C A P. III.

OF MISPRISION OF TREASON.

Misprision proditi-
onis.

See Bract. lib.
3. fo. 118. b.
& 119. a.

See hereafter ca.
65. of misprisi-
ons, &c.

See hereafter in
Theftbote, ca.

61. 1 & 2 Ph. &
Mar. Ubi supra.

See 1 E. 6. c. 12.

and 1 El. ca. 6.

25 H. 8. ca. 12.

* Hil. 14. El.

cited by the lo.

Dier in the lo.

Lumley's case.

MS.

^a 14 El. ca. 3.

^b 13 El. ca. 2.

^c 2 R. 3. fo. 9.

Stanf. 57. c.

MISPRISIO commeth of the French word *mespris* which properly signifieth neglect or contempt: for [*mes*] in composition in the French signifieth *mal* as *mis* doth in the English tongue: as mischance, for an ill chance, and so *mesprise* is ill apprehended or known. In legall understanding it signifieth, when one knoweth of any treason or felony, and concealeth it, this is misprision, so called, because the knowledge of it is an ill knowledge to him, in respect of the severe punishment for not revealing of it: for in case of misprision of high treason he is to be imprisoned during his life, to forfeit all his goods, debts, and duties for ever, and the profits of his lands during his life: and in case of felony, to be fined and imprisoned. And in this sense doth the said statute of 1 & 2 Ph. and Mar. speak, when it saith, Be it declared, and enacted, by the authority aforesaid, that concealment or keeping secret of any high treason be deemed and taken only misprision of treason, and the offenders therein to forfeit and suffer, as in cases of misprision of treason hath heretofore been used. * But by the common law concealment of high treason was treason, as it appeareth in the case of the lord Scrope, an. 3 H. 5. and by Bracton, lib. 3. fo. 118. b. and 119 a.

^a It is misprision of high treason, for forging of money, which neither is the money of this realme of England, nor currant within the same.

^b Misprision of high treason in concealing of a bull, &c. See the statute.

^c It is said in 2 R. 3. that every treason or felony includeth in it a misprision of treason or felony. Therefore if any man knoweth of any high treason, he ought with as much speed as conveniently he may to reveale the same to the king, or some of his privie counsell, or any other magistrate. And misprision in a large sense is taken for many great offences which are neither treason nor felony, whereof we shall speak more hereafter, being in this place restrained to misprision of treason.

See John Coniers case, Dier 296. That the receiving of one that hath counterfeited the king's coine, and comforting of him knowing him to have counterfeited the king's coine, is but misprision.

See more of Misprision of Treason in the chapters of High Treason, and of Principall and Accessory.

C A P.

C A P. IV.

Felony by compassing or conspiring to kill the King, or any Lord, or other of the King's Counsell.

NEXT hereunto we have thought good to speak of the statute of 3 H. 7. cap. 14. the letter of which law ensueth.

Item, **F**ORASMUCH as by quarrels made to such as have been in great authority, office, and of counsell with kings of this realme, hath ensued the destruction of kings, and the undoing of this realme; so as it hath appeared evidently, when compassing of the death of such as were of the kings true subjects was had, the destruction of the prince was imagined thereby: and for the most part it hath growne, and been occasioned by envie, and malice of the kings own household-servants; as now of late such a thing was likely to have ensued: * and for so much as by the law of this land, if actual * *Nota,* deeds be not had, there is no remedy for such false compassings, imaginations, and confederacies had against any lord, or any of the kings counsell, or any of the kings great officers in his household, as steward, treasurer, and comptroller: and so great inconveniencies might ensue, if such ungodly demeaning should not be straitly punished before that actual deed were done. Therefore it is ordained by the king, the lords spirituall and temporall, and the commons of the said parliament assembled, and by authority of the same, That from hence forward, the steward, treasurer, and comptroller of the kings house for the time being, or one of them, have full authority and power to enquire by twelve sad men, and discreet persons of the chequer roll of the kings honourable household, if any servant admitted to be his servant sworne, and his name put into the chequer roll of his household, whatsoever he be, serving in any manner, office, or roome, reputed, had and taken, under the state of a lord, make any confederacies, compassings, conspiracies, or imaginations with any person or persons, to destroy or murder the king, or any lord of this realme, or any other person sworne to the kings counsell, steward, treasurer, or comptroller of the kings house; that if it be found before the said steward for the time being, by the said twelve sad men, that any such of the kings servants as is abovesaid, hath confederated, compassed, conspired, or imagined, as is abovesaid, that he so found by that inquiry, be put thereupon to answer. And the steward, treasurer, and comptroller, or two of them have power to determine

termine the same matter according to the law. And if he put him in triall, that then it be tried by other twelve sad men of the same household: and that such misdoers have no challenge, but for malice. And if such misdoers be found guilty by confession, or otherwise, that the said offence be judged felony, and they to have judgement and execution as felons attainted ought to have by the common law.

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This act divideth itself into two generall parts, viz. the preamble, and the body of the act. In the preamble three things are to be observed.

1. That by quarrels made to such, as are in great authority, office, and of counsell with the kings of the realm, have ensued the destruction of the kings, and the undoing of the realm, as in the records of parliament, and histories of king E. 2. R. 2. king H. 6. &c. you may read. And as king William Rufus was slain in the new forest by the glance of an arrow, so the overthrow of the king, &c. hath followed by glances, and consequents, when the tow of destruction hath been aimed at the overthrow of those, who were in great authority neer about, and dear to the king, not daring in direct manner to aim at the king himself. Therefore, the first conclusion is, that when the compassing of the death of such, as were of the king's true subjects was had, the destruction of the prince was imagined thereby.

2. That for the most part, it hath grown by envy and malice by the king's own household servants: and the reason thereof is, for that they being of the kings household, have greater and readier means either by night, or by day to destroy such as be of great authority, and neer about the king: and such an attempt and conspiracy was before this parliament made by some of this kings household servants, and great mischief was like thereupon to have ensued, which was the cause of the making of this act.

3. The conclusion of the preamble is, that by the law of the land, if actual deeds be not had, there is no remedy for such false compassings, &c. This is a true declaration: for the bare conspiracy of the death of any lord or other of the king's counsell, or of the steward, treasurer, or comptroller, unlesse they had been slain indeed, was no felony before this act, and so resolved upon the contempt and conspiracy aforesaid.

In the body of this act, six things are enacted. First, that the offender must have three qualities. 1. He must be the kings servant sworn. 2. His name must be put in the cheque roll of the kings household. 3. He must be under the state of a lord: and if he conspire with any other, that is not of the kings household, yet is the conspiracy within this act, but he of the king's household is only the felon within the purview of this statute, as it appeareth by the words of the statute.

Secondly, against what persons the offence made felony by this act is to be committed: and in number they be four. 1. To destroy or murder the king. By this act it expressly appeareth by the judgement of the whole parliament, that besides the confederacy, compassing, conspiracy, or imagination, there must be some other overt act or deed tending thereunto, to make it treason within the statute of 25 E. 3. And therefore the bare confederacy, compassing,

conspiracy,

See before in
the chapt. of
High Treason.
Verb. Overt
Act.

See before in the
chapt. of high
treason, Ubi sup.

conspiracy, or imaginations by words only, is made felony by this act. But if the conspirators doe provide any weapon, or ether thing, to accomplish their devilish intent; this and the like is an overt act to make it treason. 2. Any lord of this realme being sworn of the kings councell: for by the purvien of this act, he must be also of the kings councell: this is understood of the kings privy councell, and so throughout the act. 3. Any other of the kings councell (that is, the kings privy councell) being under the degree of a lord. 4. The steward, treasurer, and comptroller of the kings household, being great officers, though they be not of the king's councell.

Thirdly, the third generall part expresseth the persons to whom power is given to enquire and determine this felony. The steward, treasurer, and comptroller, or any one of them may enquire. And they or two of them have power by this act to hear and determine the same: and though the words be for the inquiry, that they three, or any of them, &c. yet an indictment taken before two of them is good, because it is for advancement of justice. And this act is in nature of a commission to them, for other commission they need not to have: and this you may see in divers other acts of parliament of like nature. If any the household servants conspire the death of the steward, treasurer, and comptroller, yet by force of this act they are judges of the cause, and none other can be, and in that case, they will assist themselves for their direction, with some grave and learned men in the laws. But if the death of any one of them be compassed, then it is more convenient that it be heard and determined before the other two.

18 E. 3. 1.
23 Aff. 17.
27 H. 6. 8.
27 H. 8. 13.

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Fourthly, the fourth part setteth forth, first, how the inquiry, and after, the trial shall be made, that is, that the inquiry must be made by twelve sad men and discreet persons of the cheque roll of the kings household: and when the offender hath pleaded not guilty, the tryall shall be by the like persons. And here though this act limiteth the inquiry to be by twelve, yet if it be inquired of by more than twelve, the presentment is good, but the tryall must be by twelve only.

Fifthly, no challenge shall be made, but for malice.

Sixthly, by the context of the whole act, the conspiracy, that is to be heard and determined by this act, must be plotted to be done within the kings household.

Vide lib. Plac.
Coke fo. 482.

The offender against this statute shall have the benefit of his clergy: for whensoever felony is made by any statute, and the benefit of clergy is not expressly taken away, the offender shall have his clergy.

See the statute of 3 & 4 E. 6. whereby amongst other things in some case it was high treason, and in some case felony, to intend, or goe about to kill, or imprison any of the kings privy councell, &c. from which felony, the benefit of sanctuary, and clergy was taken away: but these treasons and felonies are repealed by the statute of 1 Mar.

3 & 4 E. 6. ca. 5.

C A P. V.

O F H E R E S I E.

CONCERNING heresie five things fall into consideration. First, who be the judges of heresie. Secondly, what shall be adjudged heresie. Thirdly, what is the judgement upon a man convicted of heresie. Fourthly, what the law alloweth him to save his life. Fifthly, what he shall forfeit by judgement against him.

* Braet. l. 3. fo. 123. & 124. in Conc' Oxon. Newburg. li. 2. ca. 13.

6 H. 3. Stow. Holl. 203.

2 H. 4. Rot. Parl. nu. 29 Sautries case.

Fitz. N. B. 269. a. 1 El. ca. 1. b Vid. 23 H. 8. ca. 9. F. N. B. Ubi supra. 5 El. ca. 23. 10 H. 7. 17. b. Doct. & Stud. lib. 2. ca. 29. Br. 2. Mar. tit. Heresy 1.

Touching the first, an heretique may be convicted ^a before the archbishop and other bishops, and other the clergy at a generall synod, or convocation, as it appeareth both by our books, and by history. See the statute of 25 H. 8. cap. 19. revived by 1 El. cap. 1.

^b And the bishop of every dioces may convict any for heresie, and so might he have done before the statute of 2 H. 4. ca. 15. as it appeareth by the preamble of that act in these words,

Whereas the diocesans of the said realme cannot by their jurisdiction spirituall, without aid of the said royall majesty, sufficiently correct the said false and perverse people, (i. heretiques named before) because the said false and perverse people doe goe from dioces to dioces, and will not appear before the said diocesans, but the same diocesans and their jurisdiction spirituall, and the keys of the church with the censures of the same, doe utterly contemn and despise.

Now that statute doth provide, that the diocesan of the same place, such person or persons, &c. may cause to be arrested, and under safe custody in his prisons to be detained. From this act and other acts and authorities quoted in the margent, these two conclusions are to be gathered. First, that the diocesan hath jurisdiction of heresy, and so it hath been put in ure in all queen Elizabeth's reign: and accordingly it was resolved by Flemming chief justice, Tanfield chief baron, Williams, and Crook justices, Hil. 9. Ja. R. in the case of Legate the heretique, and that upon a conviction before the ordinary of heresy, the writ of *de hæretico comburendo* doth lie. Secondly, that without the aid of that act of 2 H. 4. the diocesan could imprison no person accused of heresy, but was to proceed against him by the censures of the church. And now seeing, that not only the said act of 2 H. 4. but 25 H. 8. c. 14. are repealed, the diocesan cannot imprison any person accused of heresy, but must proceed against him, as he might have done before those statutes, by the censures of the church, as it appeareth by the said act of 2 H. 4. c. 15. Likewise the supposed statute of 5 R. 2. c. 5. and the statutes of 2 H. 5. c. 7. 25 H. 8. c. 14. 1 & 2 Ph. and Mar. c. 6. are all repealed, so as no statute made against heretiques standeth now in force;

[40]

Mat. Hammond Anno 21 El. Holl. 1579. Stowe. 1161. Hil. 9. Ja. Regis Legates case.

Vide 1. E. 6. c. 21. 1 El. c. 1.

force: and at this day no person can be indicted, or impeached for heresy before any temporall judge, or other, that hath temporall jurisdiction, as upon perusall of the said statutes appeareth.

Every archbishop of this realme may cite any person dwelling in any bishops dioces within his province for causes of heresy, if the bishop, or other ordinary immediate thereunto consent, or if that the same bishop, or other immediate ordinary, or judge doe not his duty in punishment of the same. 23 H. 8. ca. 9.

2. Touching the second point, if any person be charged with heresy before the high commissioners, they have no authority to adjudge any matter or cause to be heresy, but only such, as hath been so adjudged by the authority of the canonick scripture, or by the first four generall councells, or by any other generall councell, wherein the same was declared heresie by the expresse and plain words of the canonick scripture, or such as shall hereafter be determined to be heresy by parliament, with the assent of the convocation: for so it is expressly provided by the said act of 1 El. And albeit this proviso extendeth only to the said high commissioners, yet seeing in the high commission, there be so many bishops, and other divines, and learned men, it may serve for a good direction to others, especially to the diocesan, being a sole judge in so weighty a cause.

No manner of order, act, or determination for any matter of religion, or cause ecclesiasticall, had or made by the authority of the parliament in *anno* 1 El. shall be accepted, deemed, interpreted, or adjudged heresy, schism, or schismaticall opinion, any order, decree, sentence, constitution, or law (whatsoever the same be) notwithstanding. 1 El. ca. 1.

There was a statute supposed to be made in 5 R. 2. that commissions should be by the lord chancellor made, and directed to sheriffs, and others, to arrest such as should be certified into the chancery by the bishops, and prelates, * masters of divinity, to be preachers of heresies, and notorious errors, their fautors, maintainers, and abettors, and to hold them in strong prison, until they will justifie themselves to the law of holy church. By colour of this supposed act, ^a certaine persons, that held, that images were not to be worshipped, &c. were holden in strong prison, until they (to redeem their vexation) miserably yeelded before these masters of divinity to take an oath, and did swear to worship images, ^b which was against the morall and eternall law of Almighty God. We have said (by colour of the said supposed statute, &c.) not only in respect of the said opinion, but in respect also, that the said supposed act, was in truth never any act of parliament, though it was entred in the rolls of the parliament, for that the commons never gave their consent thereunto. And therefore in the ^c next parliament, the commons preferred a bill reciting the said supposed act, and constantly affirmed, that they never assented thereunto, and therefore desired that the said supposed statute might be aniented, and declared to be void: for they protested, that it was never their intent to be justified, and to bind themselves and their successors to the prelates, more then their ancestors had done in times past: and hereunto the king gave his royall assent in these words, *Y pleist au roy.* And mark well the manner of the penning the act: for seeing the commons did not assent thereunto, the words of the act be,

5 R. 2. stat. 2.
cap. 5. repealed
by 1 E. 6. c. 12.
& 1 Eliz. ca. 1.
* *In diebus illis*
Masters of divi-
nity (and batche-
lors of divinity)
now doctors of
divinity and
batchelors.
^a Rot. claus.
19 R. 2. m. 17.
in Dorf.
^b Exod. 20. 4.
Levit. 26. 1.
Deut. 5. 8. &
16. 22.
Psal. 97. 7.
1 John 5. 21.
^c Rot. Parl.
6 R. 2. nu. 62.
Vide 7 H. 4. nu.
62. Rot. Parl.

It is ordained and assented in this present parliament, that, &c. And so it was, being but by the king and the lords.

It is to be known, that of ancient time, when any acts of parliament were made, to the end the same might be published, and understood, especially before the use of printing came into England, the acts of parliament were ingrossed into parchment, and bundled up together with a writ in the king's name, under the great seal to the sherif of every county, sometime in Latin, and sometime in French, to command the sherif to proclaim the said statutes within his bayliwick, as well within liberties, as without. And this was the course of parliamentary proceedings, before printing came in use in England, and yet it continued after we had the print, till the reign of H. 7.

Now at the parliament holden in 5 R. 2. John Braibrook bishop of London being lord chancellor of England, caused the said ordinance of the king and lords to be inserted into the parliamentary writ of proclamation to be proclaimed amongst the acts of parliament: which writ I have seen, the purclose of which writ, after the recitall of the acts directed to the sherif of N. is in these words. *Nos volentes dictas concordias, sive ordinationes in omnibus et singulis suis articulis inviolabiliter observari, tibi præcipimus quod prædictas concordias, sive ordinationes in locis infra balivam tuam, ubi melius expedire volueris, tam infra libertates, quam extra, publice proclamari, et teneri facias juxta formam prænotatam. Teste rege apud Westm. 26 May, anno regni regis R. 2. 5.* But in the parliamentary proclamation of the acts passed in anno 6 R. 2. the said act of 6 R. 2. whereby the said supposed act of 5 R. 2. was declared to be void, is omitted: and afterwards the said supposed act of 5 R. 2. was continually printed; and the said act of 6 R. 2. hath by the prelates been ever from time to time kept from the print.

Certain men called Lollards were indicted for heresy, upon the said statute of 2 H. 4. for these opinions, viz. *Quod non est meritorium ad Sanctum Thomam, nec ad Sanctam Mariam de Walsingham peregrinari. 2. Nec imagines crucifixi et aliorum sanctorum adorare. 3. Nulli sacerdoti confiteri nisi soli Deo, &c.* Which opinions were so far from heresy, as the makers of the statute of 1 Eliz. had great cause to limit what heresy was.

And afterwards they thought not good to contain these opinions in any indictment, but indicted them in general words, one of which indictments as to lollardry and heresy followeth. *Jurati dicunt super eorum sacramentum, quod A. R. E. D. Lollardi et falsi hæretici die Jovis post hebdomadam Paschæ, anno regni regis H. 6. post conquestum nono, apud Abendon in com' Berks infra viing. falso et proditoriè ut communes proditores, et insurrectores conspiraverunt, imaginati fuerunt, et ad invicem confederaverunt cum quamplurimis proditoribus illis associatis, et felonibus de eorum cemitiva, et eorum falsa malitia præcogitata, ut communes insidiatores altarum viarum, ad fidem catholicam destruendam, et ibidem falso et proditoriè ut communes proditores, et felones dicti d'ni regis fecerunt, et scripserunt diversas falsas billas, et scripturas seditiosas, et nonnulla fidei et doctrinæ Christianæ contraria continentes, et eas populo domini regis publicandas et credendas falso, damnabiliter in diversis locis, viz. in civitatibus London, Sarum, et villis de Coventria et Marleburgh, nequiter posuerunt, fixerunt, et projecerunt, ac indies sic scribere, affigere et projicere et ponere non cessant, nec formidant, in gravissimam*

Coram Rege
Hil. 1 H. 5.
Rot. 4. & 5.

Indictment general.
*Vide supra ca. 1.
Verbo, per overt
fait.
Lollardi et falsi
hæretici.*

Communes insidiatores viarum.
*Vide sup. c. 1.
f. 5. Ad fidem
catholicam destruendam. Di-
versas falsas bil-
las et scripturas,
&c.*

nam majestatis, et coronæ dignitatis regis nostri offensam, et Christianæ fidei ludibrium, et pacis dicti domini regis perturbationem, et omnium Christi fidelium injuriam et contemptum. Which generall indictment, and all other of like form were utterly insufficient in law: for albeit the words of the statute be generall, yet the indictment must contain certainty, whereunto the party indicted may have an answer. Also where the parties are indicted, *ut communes infidiores viarum*, that also is insufficient, as it appeareth by the statute 4 H. 4. ca. 2.

John Keyser was excommunicated by the greater excommunication before Thomas archbishop of Canterbury, and legatè of the apostolique see, at the suit of another, for a reasonable part of goods, and so remained eight months: the said Keyser openly affirmed that the said sentence was not to be feared, neither did he fear it. And albeit the archbishop, or his commissary hath excommunicated me, yet before God I am not excommunicated: and he said that he spake nothing but the truth, and it so appeared; for that he the last harvest standing so excommunicate, had as great plenty of wheat, and other grain, as any of his neighbours, saying to them in scorn (as was urged against him) that a man excommunicate should not have such plenty of wheat. The archbishop denying these words to be within the said act of 2 H. 4. did by his warrant in writing comprehending the said cause, by pretext of the said act commit the body of the said Keyser to the gaol at Maidstone, for that (saith he) in respect of the publishing of the said words, *dictum Iohannem non immeritò habemus de hæresi suspectum.* By reason whereof the said John Keyser was imprisoned in Maidstone gaol, and in prison detained under the custody of the keeper there, untill by his counsell he moved sir John Markham then chief justice of England, and other the judges of the king's bench, to have an *Habeas corpus*, and thereupon (as it ought) an *Habeas corpus* was granted: upon which writ the gaoler returned the said cause, and speciall matter, and withall, according to the writ, had his body there. The court upon mature deliberation perusing the said statute, (and upon conference with divines) resolved, that upon the said words Keyser was not to be suspect of heresy, within the said statute, as the archbishop took it. And therefore the court first bayled him, and after he was delivered: for that the archbishop had no power by the said act for those words to commit him to prison.

Hillary Warner being an inhabitant within the parish of S. Dunstons in the West, held opinion and published there, and in divers other places, *quòd non tenebatur solvere aliquas decimas curatori sive ecclesiæ parochiali ubi inhabitabat.* Whereupon Richard bishop of London commanded Edward Vaughan and others to arrest the said Hillary Warner: by force whereof they did arrest him, and detained him in prison a day and a night, and then he escaped. Hillary Warner brought his action of false imprisonment against Edward Vaughan and others: in bar whereof the defendants pleaded the statute of 2 H. 4. and that the plaintiff held and published the opinion aforesaid; which opinion was, *contra fidem catholicam, seu determinationem sanctæ ecclesiæ*, and that the defendants, as servants to the said bishop, and by his commandment did arrest the plaintiff, and justified the imprisonment: whereupon Hillary Warner the plaintiff demurred in law, and after long and mature deli-

[42]

Mich. 5 E. 4.
Rot. 143. Co-
ram Rege.
In rationabili
parte bonorum.

Mich. 11. H. 7.
Rot. 327. In
communi banco.

Hil. 10 H. 7.
f. 17.

See in the second
part of the Insti-
tutes, the expo-
sition upon the
statute of *Artic.*
Cleri, the reso-
lution of all the
judges of Eng-
land to the 21
and 22 articles,
or objections.

[43]

^a Mir. cap. 4.
de Majestie.
Braſton, ubi
supra.
Britton, cap. 9.
Fleta lib. 1. ca.
35. Register.
F. N. B. 269.

^b F. N. B. 269.
Rot. Par. 2 H.
4. nu. 29. Sau-
tryes case.
Erc. de hæretico
comburendo per
regem & concilium in parlia-
mento.

^c 2 Mar. tit. he-
resie, Br. 7.

^d 2 Mar. ubi su-
pra.

^e Vid. Doct. et
Stud. lib. 2. ca. 29.

beration it was by Brian chief justice, and the whole court of com-
mon pleas adjudged, that the said opinion was not within the said
statute of 2 H. 4. for that it was an error, but no heresy. Which
I have the rather reported, for that the reporter of this case did not
only misreport the time of the bringing of the action, but the
statute, which was the ground of the matter in law, and leaveth
out the judgement. The record it self is worthy the reading.

Upon that which hath been said touching the said statute of
2 H. 4. four conclusions doe necessary follow. First, that seeing,
that many opinions were by the bishops taken to be heresy, which
in troth had no shadow of heresy, and so mistaken, and unjustly
extended by the bishops further than the purvien, and true inten-
tion thereof, as by that which hath been, and might be said, ap-
peared, the makers of the said act of parliament of 1 El. had great
reason to limit (as hath been said) what opinions should be judged
heresy by authority of that commission grounded upon that act.
Secondly, that if any ecclesiasticall judge or commissioner shall by
pretext of any statute, or other cause, commit any man to prison, up-
on motion in court on the behalf of the party imprisoned, the judges
of the common law ought to grant an *Habeas corpus* for him: upon
the return of which writ, if it shall appear to the judges, that the
imprisonment is well warranted by law, the party shall be remand-
ed: and if the imprisonment be without warrant of law, then the
party ought to be delivered. Thirdly, if the imprisonment be not
warranted by law, the party imprisoned may have his action of
false imprisonment, and recover his damages. Fourthly, that
when an act of parliament is made concerning matter meerly spi-
rituall, as heresie, &c. yet that act being part of the lawes of the
realm, the same shall be construed and interpreted by the judges
of the common lawes, who usually confer with those that are
learned in that profession. But let us now descend to the third point.

3. To the third. ^a It appeareth by Braſton, Britton, Fleta,
Stanford, and all our books, that he that is duly convict of heresie,
shall be burnt to death.

4. To the fourth. ^b The ecclesiasticall judge at this day cannot
commit the person that is convict of heresie to the sheriffe, albeit
he be present, to be burnt; but must have the king's writ *de hæ-*
retico comburendo, according to the common law: for now all acts
of parliament (as hath been said before) against hereticks are re-
pealed. And the reason wherefore heresie is so extremely and
fearfully punished, is, for that *gravius est æternam, quam temporalem*
lædere majestatem: and *hæresis est lepra animæ*. ^c The party duly
convicted of heresie, may recall, and abjure his opinion, and there-
by save his life, but a relapse is fatall: for as in case of a disease of
the body, after recovery, recidivation is extremely dangerous: so in
case of heresie (a disease of the soule) a relapse is irrecoverable. And as
he that is a leper of his body, is to be removed from the society of
men, lest he should infect them, by the king's writ *de leproso amo-*
vendo: so he that hath *lepram animæ*, that is, to be convicted of
heresie, shall be cut off, lest he should poyson others, by the
king's writ *de hæretico comburendo*. But if the heretick will not after
conviction abjure, he may by force of the said writ ^d *de hæretico*
comburendo be burnt without abjuration.

3. As to the fifth. ^e The statute made in the 2 year of H. 5.
cap.

cap. 7. whereby the forfeiture of lands in fee-simple, and goods, and chattels was given in case of heresie, standeth repealed by the act of 1 Eliz. cap. 1. The books that speak of this forfeiture are grounded upon the said act of 2 H. 5. which then stood in force, saving 5 R 2. which was before that statute: for there, though Belknap swore, *per ma foy si home soit miscreant, sa terre est forfeitable, et le seignieur avera ceo p. vey descheate*; yet was his opinion never holden for law: for neither lands, nor goods ^f before the making of that statute of 2 H. 5. were forfeited by the conviction of heresie, because the proceeding therein is meerely spirituall, *pro salute animæ*, and in a court that is no court of record. And therefore the conviction of heresie worketh no forfeiture of any thing that is temporall, viz. of lands or goods. ^g For what cause the said hereticks were called Lollards you may read in Caudries case, and Linwood thereto agreeth. * And it is to be observed, that in proceeding against Lollards, the prelates, besides their opinions, did charge them with hainous offences: as conspiracy with multitudes of people, insurrection, rebellion, or some other treason, or great crimes.

We have spoken thus much of this argument, because there be divers wandring opinions concerning some of these points, that are not agreeable to the law, as it standeth at this day. See the fourth part of the Institutes, cap. Chancery, in the articles against Cardinal Woolsey, artic. 44.

Br. tit. Forfeiture 112.
Stan. pl. cor. 35.
I. 2 Mar. Br.
tit. Heresie.

^f Vid. hereafter
in case of piracy.

^g Lib. 5. Caudries case, fol. 25. b.
* 1 H. 5. fo. 6. a.
Rot. Parl. 5 H. 5. nu. 11. in the case of Sir John Oldcastle.
Pascn. 9 H. 6. John Sharps case, &c. Rot. Parl. 7 H. 4. nu. 67.
11 H. 4. nu. 29.
3 H. 5. nu. 39.
1 H. 6. nu. 20.

C A P. VI.

Of Felony by Conjurat[i]on, Witchcraft, Sorcery, or Inchantment.

THE first act of parliament that made any of these offences felony, was the statute ^a of 33 H. 8. which was repealed by the statutes of 1 E. 6. cap. 12. and 1 Mariæ. But ^b before the conquest it was severely punished: sometimes by death, sometimes by exile, &c. ^c And after, it was made felony by the statute of 5 Eliz. and againe by 1 Jac. which repealeth 5 Eliz.

A conjurer is he that by the holy and powerfull names of Almighty God invokes and conjures the devill to consult with him, or to do some act.

A witch is a person that hath conference with the devill, to consult with him or to do some act.

An inchanter, *incantator*, is he, or she *qui carminibus, aut cantuunculis dæmonem adjurat*. They were of ancient time called *carmina*, because in those dayes their charmes were in verse.

Carminibus Circe socies mutavit Ulyssis.

By charmes in rhyme (O cruell fates!)

Circe transform'd Ulysses mates.

And again. *Carmina de cælo possunt detrudere lunam.*

By rhymes they can pul down full soon,

From lofty sky the wandring moon.

* A forcerer, *sortilegus, quia utitur sortibus in cantationibus dæ-*

E 3

* A forcerer described.

^a 33 H. 8. ca. 8. 1 E. 6. cap. 12.
^b Inter leges Alveredi, fo. 23. Edwardi et Guthruni, cap. 11. Ethelstani, ca. 6. Canuti, 4, 5.
^c 5 Eliz. ca. 16. 1 Jac. cap. 12. A conjurer described.

A witch described.

An inchanter described.

Exod. cap. 22.
17. Deut. ca. 18.
10, 11, 12.
Num. ca. 23.
23. 1 Reg. ca.
15. 23.

^d Linwood de of-
ficio arch-presb.
§ Ignorantia.

* Mir. cap. 1.
§. 5. & cap. 2.
§ 12. & cap. 4.
§ De majestie.
Brit. fo. 16 b.
& 71
F. N. B. 269. b.

^e Int. leges Edw.
ca. 11. fo. 55.
& Ethelstani ca.
6. fo. 60.
& Canuti cap. 5.
fo. 5.

45 E. 3. 17. b.
* Some think that
this should be the
oath of allegi-
ance, *Que il serra
foiallet loiall, &c.*
Vid. 25 E. 3. 42.
B. Coron. 131.
See hereafter
ca. 74. of perjury,
verb. That as
well the judge,
&c.

[45]

1 Chron. chap.
10. v. 13, 14.
1 Reg 15. 23.
* Nota.
1 Reg. 28. 8.

monis. Thou shalt not suffer a witch to live. *Non est augurium in Jacob, nec divinatio in Israel.* And the Holy Ghost hath compared the great offence of rebellion to the sinne of witchcraft.

And here it justly may be demanded, what punishment was against these devilish and wicked offenders before these statutes, which were made of very late time.

And it appeareth by our ancient ^d books that these horrible and devilish offenders, which left the everliving God, and sacrificed to the devill, and thereby committed idolatry, in seeking advice and aide of him, were punished by death. * The Mirror saith, *Que forcery et devinal sont members de heresie.* And there he describeth heresie. *Heresie est un mauuaise et faux creance surdant de error en la droit foy Christien :* and after saith, *Le judgement de heresie est dec arse in cendre.* And herewith agreeth Britton: *Sorcerers, forcereffes, &c. et miscreants soient arses.* And Fleta: *Christiani autem apostatae, sortilegi, et hujusmodi detractari debent, et comburi.* And burning then was, and yet is the punishment for hereticks. So as the consufance of these offences, if they be branches of heresie, (as the law was then taken) belonged (as to this day heresie doth) to ecclesiasticall judges. In which case when they have given sentence, there lieth a writ *de heretico comburendo.*

I have seen a report of a case in an ancient Register, that in October anno 20 H. 6. Margery Gurdeman of Eye, in the county of Suffolk, was for witchcraft and consultation with the devill, after sentence and a relapse, burnt by the king's writ *de heretico comburendo.* ^e And this agreeth with antiquity, for witches, &c. by the laws before the conquest were burnt to death.

A man was taken in Southwark with a head and a face of a dead man, and with a book of forcery in his male, and was brought into the king's bench before Sir John Knevet then chief justice: but seeing no indictment was against him, the clerks did swear him, that from thenceforth * he should not be a forcerer, and was delivered out of prison, and the head of the dead man and the book of forcery were burnt at Tuthill at the costs of the prisoner. So as the head and his book of forcery had the same punishment, that the forcerer should have had by the ancient law, if he had by his forcery praied in aid of the devill.

The holy history hath a most remarkable place concerning the reprobation and death of king Saul. *Mortuus est ergo Saul propter iniquitates suas, eo quod praevaricatus sit mandatum Domini, et non custodierit illud, * sed insuper Pythonissam consuluerit, nec speraverit in Domino; propter quod interfecit eum, et transtulit regnum ejus ad David filium Isai.* So Saul died for his transgression which he committed against the Lord, even against the word of the Lord which he kept not: and also for asking counsell of one that had a familiar spirit, to enquire of it, and enquired not of the Lord; therefore he slew him, and turned the kingdome unto David the sonne of Isai.

Therefore it had been a great defect in government, if so great an abomination had passed with impunity. And this is the cause, that we have proved how and in what manner conjuration, witchcraft, &c. were punished by death, &c. before the making of the said late statutes.

But now let us peruse the statute made in the first year of king James,

1 Jac. cap. 12.

James, which only standeth in force, and divideth itself into five severall branches.

1. If any person or persons shall use, practise, or exercise any invocation or conjuration of any evill and wicked spirit.

Here the devill by the holy, and powerfull names of Almighty God is invoked (as hath been said :) and this invocation, or conjuration of a wicked spirit is felony, without any other act or thing, save only the apparition of the spirit. See W. 1. cap. 41. in the oath of the champion, &c.

2. Or shall consult, covenant with, entertaine, employ, feed, or reward, any evill or wicked spirit, to, or for any intent or purpose.

By this branch, if any consult, &c. (howsoever the wicked spirit appeareth and commeth) these actions (here mentioned) with or to that wicked spirit, to or for any intent or purpose, is felony without any other act or thing.

3. Or take up any dead man, woman, or childe, out of his, her, or their grave, or any other place where the dead body resteth, or the skin, bone, or any part of a dead person, to be imployed or used in any manner of witchcraft, forcery, charme, or inchantment.

Albeit the offender that commits these barbarous and inhumane dealings with the bodies of the dead, do not actually imploy or use them in witchcraft, forcery, charme, or inchantment: yet if he did them of purpose to use therein, it is felony, for the words of this branch be, [to be imployed or used in any manner of witchcraft, &c.]

4. Or shall use, practise, or exercise any witchcraft, inchantment, charme or forcery, whereby any person shall be killed, destroyed, wasted, consumed, pined, or lamed, in his, or her bodie, or any part thereof.

By this branch, no other witchcraft, inchantment, charme, or forcery (then is before specified) is felony, unlesse by means thereof some person be killed, destroyed, wasted, consumed, pined or lamed, &c. Which words have reference only to this last generall clause.

5. That then every such offender or offenders, their aiders, abettors, and counsellors, being of any the said offences duly and lawfully convicted, and attainted, shall suffer paines of death, as a felon, or felons, and shall lose the priviledge, and benefit of clergie, and sanctuary.

Albeit accessories before be here specially named, yet accessories after may be of this felony, as afterwards is said upon the statute of 3 H. 7. for taking away of women, and upon the statute of 8 H. 6. for stealing of records.

The second part of this act concerneth felony in a second degree; and the branches thereof are also in number five.

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1. If any person or persons take upon him or them by witchcraft, inchantment, charme, or forcery, to tell or declare, in what place any treasure of gold or silver should or might be found, or had in the earth, or other secret places.

The mischiefs before this part of the act was: That divers impostors, men and women would take upon them to tell, or do, these five things here specified, in great deceit of the people, and cheating and coufening them of their money, or other goods. Therefore was this part of the act made, wherein these words [take upon him or them] are very remarkable. For if they take upon them, &c. though in truth they do it not, nor can do it, yet are they in danger of this first branch.

2. Or where goods, or other things lost, or stoll should be found or become.

Herein they become offenders, if they take upon them as aforesaid. And note, the taking upon them, to tell and declare, governe both these branches.

3. Or to the intent to provoke any person to unlawfull love.

Herein also they become offenders, by taking upon them, as is aforesaid. Here is the change of a new verbe, viz. [to provoke] so as the sense is, if any person or persons shall take upon him or them by witchcraft, inchantment, charme or forcery, to the intent, to provoke any person to unlawfull love.

4. Or whereby any cattel or goods of any person shall be destroyed.

The letter of this branch is this: If any person shall take upon him by witchcraft, inchantment, charm, or forcery, whereby any cattel or goods of any person should be destroyed. Although this be not sententious, yet the meaning thereof is to be taken, by supplying these words after forcery [any thing] and not to turn [destroyed] into the infinitive mood, as the rest be; for then it satisfied not the meaning of the makers: for a taking upon them to destroy cattel, &c. if they be not destroyed, is not within the danger of this act, and therefore must be supplied as is aforesaid.

5. Or to hurt or destroy any person in his or her body, although the same be not effected or done.

As

As in the case of cattel or goods, the destruction must be (as is aforesaid) effected and done: so in case of the person of man, woman, or childe, though the hurt be not effected, or done; yet is the taking upon him, &c. to hurt or destroy any person, &c. within this branch.

Being therefore lawfully convicted.

Here [convicted] is taken in a large sense for attainted, and the rather, for that after in this act the words be [lawfully convicted and attainted, as is aforesaid.]

Shall for the said offence, &c.

Here are expressed the punishments inflicted upon these impostors, mountebanks, and cheating quacksalvers, viz. 1. To suffer imprisonment by the space of a whole year without bail or mainprize. 2. Once every quarter of the year these mountebanks are to mount the pillory, and to stand thereupon in some market towne six houres, and there to confess his or her error, and offence.

And if any person being once convicted of the same offences, &c.

Here is also [convicted] taken for attainted, for he shall not be drawn in question for the second offence, to make it felony, till judgement be given against him for the first; for the indictment of felony recites the former attainder, and the second offence must be committed after the judgement. And so it is in the case of forgery upon the statute of 5 Eliz. and in case of convey[ing] of sheep alive out of this realme, and some others.

5 Eliz. cap. 14.
8 Eliz. cap. 3.

Saving to the wife of such person as shall offend in any thing contrary to this act, her title of dower, and also to the heire and successor of every person, his or their titles of inheritance, succession, and other rights, as though no such attainder of the ancestor or predecessor had been made.]

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The judgement against a felon is, that he be hanged by the neck until he be dead: and albeit nothing else is expressed in the judgement, yet by the common law many things are therein implied; as the losse of his wives dower, the losse of his inheritance, corruption of his blood, forfeiture of his goods, &c. Now a saving will serve for any thing, that is implied in the judgement, as in this case for the wives dower, and also for the heirs inheritance, and for all the rest of the things implied in the judgement. But a saving will not serve against the expresse judgement in case of felony, for that should be repugnant; as saving the life of the offender should be void, because it is repugnant to the expresse judgement, viz. that he be hanged by the neck until he be dead. Also where the saving is to the heir, it is well saved by the name of the heir, because notwithstanding the forfeiture implied in the judgement, his inheritance is saved, and by consequent the blood not corrupted, for if

See the 1. part of
the Institutes.
sect. 747.

Vide lib 1. in
the case of Alton
Woods. fo.

if the blood were corrupted, he could not inherit as heir, but notwithstanding this saving the lands are forfeited during his life.

5 El. cap. 14.

The statute of 5 Eliz. for preservation of the wives dower, and the heirs inheritance, in case of forgery, is penned in this form. Provided alway, that such attainder of felony shall not in any wise extend to take away the dower of the wife of any such person attaint: nor to the corruption of blood, or disherison of any heir or heirs of any such person attaint.

8 El. ca. 3.

The words of the statute of 8 Eliz. be, Provided always that this act shall not extend to corruption of blood, or be prejudiciall or hurtfull to any woman claiming dower by or from any such offender, &c. Wherein it is to be observed, that by the avoidance of corruption of blood, the inheritance is impliedly saved. See the manner of the penning of the act of 31 Eliz. concerning this matter and divers others.

31 El. ca. 4.

See the statute
of 3. Ja. ca. 4.

And surely it is very convenient that when new felonies be made by act of parliament, that such savings or provisions be made both for the wives dower, and the heirs inheritance, as were had and made in these presidents.

C A P. VII.

OF MURDER.

^a See the 1. pt. of the Instit. for the word Murder, sect. 287. and for Felony, sect. 500 & 745.

See the 2. part of Instit. Marlbr. ca. 25. Cust. de Norm. cap. 68.

^b The definition of murder.

Vid. devant. ca. Treason. verb.

Quant home, &c. Bract. l. 3. fo.

120, 121, 134,

135. Brit. fo. 5.

18. Fleta, lib. 1.

cap. 23. & 30.

Mirror, cap. 1.

§. ca. 2. § 11.

de Appel de

homicide. Tr.

32 E. 1.

Coram Rege Rot.

15.

25 E. 3. 28.

26 Aff. p. 27.

3 E 3. cor. 383.

3 H. 7. ca. 1.

3 H. 7. 1. 12.

21 H. 7. 31.

E. 2. Coron. 389.

1 Ma. Dier, 104.

b. See the

first part of the Instit. 104.

HAVING^a now passed High Treason, Petit Treason, Misprision of Treason, Felony by the statute of 3 H. 7. Heresy, and Conjururation, Witchcraft, &c. we are next in order to treat of felonies in general: and of all felonies, murder is the most hainous. *Inter leges Canuti, ca. 61. fo. 118. Cædes manifestæ numerantur inter scelera nullo humano jure expiabilia.* See here, ca. Pardon. And of all murders, murder by poysoning is the most detestable. Therefore first of murder. *Murdrum* is derived of the Saxon word *merd*.

^b Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same.

Hereof we will speak, together with some things concerning the accessories to the same, and leave the residue to others, that have written thereof. Now let us examine the principal parts of this description.

Killing.] As by poyson, weapon sharp or blunt, gun, cross-bow, crushing, bruising, smothering, suffocating, strangling, drowning, burning, burying, famishing, throwing down, inciting a dog,

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Tr. 31. E. 3.

Coram rege.

Rot. 54. per

ma. canis.

a dog, or bear, &c. to bite, or hurt, &c. whereof death ensueth, laying a sick man in the cold, &c.

Poyson, (*Venenum, à venis, quia à venis permeat*) is, as hath been said, the most detestable of all, because it is most horrible, and fearfull to the nature of man, and of all others can be least prevented, either by manhood, or providence: and that made Fleta to say, *Item nec per patriam se defendere debet quis de veneno dato, sed tantum per corpus suum, eo quod initium facti non fuit tam publicum, quod sciri poterit à patria, &c.* but that is not holden for law at this day.

^a This offence was so odious, that by act of parliament it was made high treason, and inflicted a more grievous and lingring death then the common law prescribeth, viz. That the offender should be boyled to death in hot water: upon which statute ^b Margaret Davy a young woman was attainted of high treason for poysoning of her mistris, and some others were boyled to death in Smithfield the 17 day of March in the same yeer. But this act was too severe to live long, and therefore was repealed by 1 E. 6. cap. 12. and 1 Mar. cap. 1.

All the ancient authors, *ubi supra*, of old time defined murder to be, *occulta hominis occisio, &c.* when it was done in secret, so as the offender was not known: but now it is taken in a larger sense.

Britton mentioneth another kind of murder (which is not holden for murder at this day) when he saith: *Ceux auxi que fauxement pur lower, ou en auter manner ont ascun home damne ou fait damner au mort, &c.* yet this is murder before God. And David killed Uriah with his pen, and these men with their tongue.

Within any county of the realm.] ^c If two of the kings subjects goe over into a forain realm and fight there, and the one kill the other, this murder being done out of the realm, cannot be for want of triall heard and determined by the common law: ^d but it may be heard and determined before the constable and marshall.

If A. give B. a mortal wound in a forain country, B. commeth into England and dieth: this cannot be tried by the common law, because the stroke was given there, where no *visne* can come, but the same shall be heard and determined before the constable and marshall: for the words of the statute of 13 R. 2. be: To the constable it pertaineth to have consufance of contracts, concerning deeds of arms, or of war out of the realm, and also of things that touch arms, or war within the realm, which cannot be determined or discussed by the common law.

If a man be stricken upon the high sea, and dieth of the same stroke upon the land, this cannot be inquired of by the common law, because no *visne* can come from the place, where the stroke was given (though it were within the sea pertaining to the realm of England, and within the liegeance of the king) because it is not within any of the counties of the realm. Neither can the admirall hear and determine this murder, because though the stroke was within his jurisdiction, yet the death was *infra corpus comitatus*, whereof he cannot inquire: neither is it within the statute of 28 H. 8. because the murder was not committed on the sea. But by the said act of 13 R. 2. the constable and marshall may hear and determine the same. And before the making of the statute of 2 E. 6. if

a man

Braet. l. 3. f. 121. Brit. fo. 14. See lib. Intr. Coke 25. lib. 4. fo. 44. Vauxes case. Lib. 9. fo. 81. Agnes Gores case.

Deut. 28. 24. Cursed is he that smiteth his neighbour secretly.

^a 22 H. 8. ca. 9. Read the statute. Dier, 33 H. 8. fol. 50. a. Saccombes case.

^b Anno 33 H. 8.

Britton, fo. 14.

^c 13 H. 4. 5 & 6. Stanf. pl. cor. 65. Mic. 25 & 26 El. fo. resolved in Downties case.

^d 13 R. 2. ca. 2. 1 H. 4. c. 14. Rot. Parl. 8 H. 6. nu. 38.

13 R. 2. ca. 2.

Lib. 2. fo. 93. Tr. 25 Eliz. in Lacyes case. Fortescue, ca. 32. fo. 38.

28 H. 8. ca. 13.

2 E. 6. ca. 24.

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18 E. 3. 32.

9 H. 6. 63.

3 H. 7. 12.

4 H. 7. 18.

6 H. 7. 10.

a man had been feloniously stricken, or poysoned in one county, and after had died in another county, no sufficient indictment could thereof have been taken in either of the said counties, because by the law of the realm, the jurors of one county could not inquire of that, which was done in an other county. It is provided by that act that the indictment may be taken, and the appeal brought in that county, where the death doth happen. Before the making of this statute, the appeal might have been brought in either of the said counties, but the triall must have been out of both: but when both counties could not joyn, then both appeal and indictment failed at the common law.

But here be two things to be observed: first, that in case of treason or misprision thereof, or of felony, or misprision of the same within the realm, the party ought to be indicted within the same county, where the fact is done, and it cannot be alledged in any other county, then in truth where it was done. And therefore in the case above said, neither the stroke, nor poysoning, nor the death, though they be transitory, can be alledged in the indictment or appeal, but where in truth they were done. Secondly, the statute of 2 E. 6. extendeth not where one is stricken or poysoned on the sea, or in any forain kingdome, and dieth in England, but where one is stricken or poysoned in one county, and dieth in another.

This act extendeth, where the murder, or felony is done in one county, and another shall be accessory in another county: whereof you may read at large in the lord Sanchar's case.

Lib. 9. fo. 117,
118. &c.

Mich. 13 Jac.
regis.

Sir Thomas Overburies case.
See hereafter.
ca. 62. of Indictments more
of this case.

Richard Weston being Sir Thomas Overburies keeper in the Tower of London, did poyson him in that part of the Tower which is within London. R. earl of S. and F. his wife, James Franklin and Anne Turner were accessories before the fact in the county of Midd. and Sir Gervase Helwys lieutenant of the Tower was accessory before the fact in London. Now upon this statute of 2 E. 6. ca. 24. divers questions were resolved: first, if the accessory be in Midd. where the kings bench sit, and the principall is attainted in another county, the kings bench may try the accessory, as it was resolved in the lord Sanchars case, *ubi supra*. 2. If the indictment of the accessory be taken in the kings bench, the justices shall not by force of the statute of 2 E. 6. write in their own names, *quia placita sunt coram rege, & non coram justiciariis*, but remove the record by the kings writ of *certiorari*. 3. Divers presidents were shewn, that where accessories before the fact were in Midd. where the kings bench did sit, &c. and the attainder of the principall had been in another county, the justices of the kings bench have removed the attainder by writ of *certiorari* before them. See the lord Sanchars case, *ubi supra*, and another case where the principall was attainted in the county of Oxon, before justices of oier and terminer, and the accessory was in Midd. where the kings bench sate. 4. Richard Weston being attainted as principall in the city of London, proceeding was to be had against James Franklin and Anne Turner in the kings bench where they were indicted. The question was, if the kings bench should remove the record of the attainder of the principall by *certiorari* before them, and after the said earl and his wife should be tried by their peers before the lord steward, whether the Lord steward might write to the kings bench for the record of the attainder: for the words of 2 E. 6. be, Shall write to the *custos rotulorum*, or keepers of the record where
such

such principall shall hereafter be attainted or convict. And to prevent all doubts, a speciall writ was directed according to the words of the act, to the commissioners of oier and terminer, to certifie whether the principall was attainted, convicted, or acquitted, and they made a particular certificate accordingly: so as the record of the attainder remained still with the commissioners of oier and terminer in London. 5. It was resolved upon consideration had of the whole act, that the words of the act being, the justices of gaol delivery, or of oier and terminer, or other there authorized, shall proceed, &c. the same extend to the high steward to write, &c.

The indictment of Richard Weston was, that he 9 *die Maii anno 11 regis Jacobi, &c.* gave to Sir Thomas Overbury a poyson called roseacre in broth, which Sir Thomas Overbury not knowing it, received, *et ut idem Ri. Weston præfatum Thomam Overbury magis celeriter interficeret, et murraret, 1 Junii anno 11 Jac. regis,* gave unto him another poyson called white arsenick. And that Richard Weston, 10 *Julii, anno 11. Jac. regis,* gave unto him poyson, called mercury sublimat, in tarts, &c. *ut præd. Thomam magis celeriter interficeret, & murraret.* And that a person unknown, by the procurement, and in the presence of Richard Weston, 14 *Septemb. 11. supradicto,* gave to the said Thomas a glyster with poyson in it, called mercury sublimat, &c. *ut præd. Thomam magis celeriter interficeret et murraret. Et prædict. Thomas Overbury de separalibus venenis prædict. et operatione inde à prædict. separalibus temporibus, &c. graviter languebat usque 15 diem. Septemb. anno 11. supradicto, quo quidem 15 die Septembris, &c. prædictus Thomas de separalibus venenis prædictis obiit venenatus.* And this was resolved to be a good indictment by all the justices of the king's bench, although it doth not appeare in particular, of which of the said poysons he died. For the substance of the indictment was, whether he was poysoned or no, by the said Richard Weston. And upon this indictment he was arraigned, pleaded not guilty, and had judgement given against him. And afterward Anne Turner, Sir Gervase Helwys lieutenant of the Tower, and Richard Franklin the physitian, were indicted as accessories before the fact, and arraigned, and pleaded not guilty: and it fell out in evidence, that Franklin had prepared divers other poysons, then were contained in the indictment, as the powder of diamonds, the powder of spiders, lapis causticus, and cantharides, over and besides the poysons in the indictment. And it was resolved, that any of these was sufficient to prove the indictment; for the substance of the indictment was poysoning, which (as hath been said) is secret: see Machallis case *ubi supra*, and after verdict, judgement was given against all these accessories. And after, the said earle and the countesse his wife were indicted as accessories before the fact, and were arraigned before the lord chancellor of England, and *hac vice*, lord high steward of England: and upon the arraignment of the countesse, she confessed the indictment: and when the clerk of the crown did ask her, What she could say why judgement of death should not be given against her? she said, That she could say much against her selfe, but nothing for her selfe. And then the lord steward gave judgement of death against her, viz. That she should be hanged by the neck till she were dead: and adjourned his commission, (as it was resolved he might do by law) untill the next day: and then
the

the said earle was arraigned, and pleaded not guilty, and put himself upon his peers, who found him guilty: and thereupon the lord steward gave the like judgement against him. Which case we have recited the more largely for two causes. First, for that we remember not any of the nobility of this realm to have been attainted in former times for poysoning of any. Secondly, for that it is the first case that fell out upon the said act of 2 E. 6. in case of triall by peers of any that was noble, and the proceeding herein was by great advisement. But now let us return where we left.

Reasonable creature, in rerum natura.] As man, woman, childe, subject born, or alien, persons outlawed, or otherwise attainted of treason, felony, or premunire, Christian, Jew, Heathen, Turk, or other Infidel, being under the kings peace.

^a A master of a ship and divers mariners, &c. were attainted of murder before justices in eire, for drowning of many Jewes within the county of Kent.

^b If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive. And the ^c book in 1 E. 3. was never holden for law. And 3 Aff. p. 2. is but a repetition of that case. And so horrible an offence should not go unpunished. And so was the law holden ^d in Bractons time, *Si aliquis qui mulierem prægnantem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum fuerit; et maxime si fuerit animatum, facit homicidium.* And herewith agreeth Fleta: and herein the law is grounded upon the law of God, which saith, *Quicumque effuderit humanum sanguinem, fundetur sanguis illius, ad imaginem quippe Dei creatus est homo.* If a man counsell a woman to kill the childe within her wombe, when it shall be born, and after she is delivered of the childe, she killeth it; the counsellor is an accessory to the murder, and yet at the time of the commandement, or counsell, no murder could be committed of the childe *in utero matris*: the reason of which case proveth well the other case.

Malice prepensed.] First let us see what this malice is.

Malice prepensed is, when one compasseth to kill, wound, or beat another, and doth it *sedato animo*. This is said in law to be malice forethought, prepensed, *malitia præcogitata*. This malice is so odious in law, as though it be intended against one, it shall be extended towards another. * *Si quis unum percusserit, cum alium percutere vellet, in felonia tenetur.*

Mandata recipiunt strictam interpretationem, sed illicita latam et extensivam. But herein there is a diversity between the principall and the accessory. For if A command B, to kill C, and B by mistaking killeth D in stead of C, this is murder in B because he did the act: and it sprang out of the root of malice, and the law shall couple the event to the cause: but A is not accessory, because his commandement was not pursued; and his consent, which must make him accessory, cannot be drawne to it, for he never commanded the death of D. But where death ensueth upon that act which is commanded,

^a Chro. de Dunstable, Holl. 252. Coram Justic. Itiner. in Com. Kane. 18 E. 1. See the second part of the Inst. cap. Stat. de Judaismo.

^b 22 E. 3. Corron. 263. 8 E. 2. Cor. 418. Stan. p. cor. 21. c.

^c 1 E. 3. 23, 24. 3 Aff. p. 2.

^d Bract. li. 3. f. 21. Fleta, lib. ca. 23.

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Genesis, c. 6. v. 6.

Dier. 3. Eliz. fol. 186.

Dier. 3 Mar. 128. Pl. Com. 474, 475, 476. Lib. 9. fol. 81. Agnes Gores case.

* Bracton, lib. 3. fol. 155.

commanded, though death it selfe be not commanded, there he is accessory to it, for there the commandement is the cause of death. As if A command B to beat C, and he beat him, whereof he dieth: the commander is accessory, and therefore the diversity is apparent, as to the accessory. Where death is pursuant, and followeth upon the act commanded, there the consent of the commander may well be drawn to it, for that the commandement is the mean of the death. But where death ensueth upon another distinct cause, there the consent of the accessory cannot be drawn to it, *et sic de cæteris*.

Another diversity there is, when the commandement extends expressly to the killing of another, and for the better accomplishment thereof prescribeth a mean; that is, to kill him by poyson, and he killeth him with a gun, he is accessory: for the commandement was to kill, which ensued, though the mean was not followed, *et finis rei attendendus est*. And the substance of the commandement, viz. [to kill] is pursued: and the same offence that was commanded, is committed. But otherwise it is, if the same offence which is commanded be not committed. As if one command one to rob the vintners man of plate, as he is to come to a gentlemans chamber to his supper with wine; and he breaketh the taverne in the night, and stealeth the plate there; the commander is not accessory to this burglary, for this is another offence then he commanded, and the consent of the accessory must be drawn to the murder or felony committed.

2. It must be malice continuing untill the mortall wound, or the like be given. Albeit there had been malice between two, and after they are pacified and made friends, and after this upon a new occasion fall out, and the one killeth the other; this is homicide, but no murder, because the former malice continued not.

If A command B to kill C, and before the act be done, A repenteth and countermand his commandement, and charge B not to do it: if B after killeth him, A is not accessory to it: for the malicious minde of the accessory ought to continue to do ill untill the act done.

Pl. Com. ubi
sup.

If two fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch their weapon, and go into the field, and therein fight, the one killeth the other: here is no malice prepenfed, for the fetching of the weapon and going into the field, is but a continuance of the sudden falling out, and the blood was never cooled. But if they appoint to fight the next day, that is malice prepenfed.

Malice implied, is in three cases.] First, in respect of the manner of the deed. As if one killeth another without any provocation of the part of him, that is slain, the law implieth malice: whereof you may read lib. 9. fol. 67. Mackallies case. Also the poysoning of any man, whereof he dieth within the year, implieth malice, and is adjudged wilfull murder of malice prepenfed. One may be poysoned four manner of ways: *gustu* by taste, that is by eating, or drinking, being infused into his meat or drink: *anhelitu*, by taking in of breath, as by a poysonous perfume in a chamber, or other room: 3. *contactu*, by touching: and lastly, *suppositu*, as by a glyster or the like. Now for the better finding out of this horrible offence, there be divers kindes of poysons, as the powder of diamonds,

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Lib. 9. fo. 67. b.
in Mackallies
case.
1 E. 6. c. 12

diamonds, the powder of spiders, *lapis causticus*, (the chief ingredient whereof is soap) cantharides, mercury sublimite, arsenick, roseacre, &c.

Lib. 9. fo. 68.

Mackallies case.
Ubi supra.
Lib. 4. fo. 40. b.
41. a. Youngs
case.

Mackallies case.
Ubi supra.

Brit. ca. 11. De
prisons fo. 18. a.
See the Mirror
cap. 2. §. 11.
De homicide.
5 H. 6. 58.
27 Aff. p. 41.

Bract. 1. 3.
fo. 104.

See hereafter in
the title of San-
ctuary for Ab-
juration.
Pasch. 20 R. 2.
Coram Rege
Linc. Ro. 58.
* Mich. 1 R. 2.
Coram Rege.
Rot. 1. Bedf.
See hereafter
cap. Judgement
and Execution.

* Pasch. 39 E. 3.
Coram Rege
Rot. 92. Wiltes.
Simile Pasch.
28 E. 3. Coram
Rege Rot. 37.
In case de Mor-
timer, who was
put to death
anno 1 E. 3.
Vide Rot. Bre-
vium anno
1 E. 3. part. 1.

2. In respect of the person slain. As if a magistrate or known officer, or any other, that hath lawfull warrant, and in doing, or offering to doe his office, or to execute his warrant, is slain, this is murder, by malice implied by law, as the sherif, justice of the peace, undersherif, chief constable, petit constable, or any other minister of the king. If a man kill a watchman doing his office, it is murder: so it is, if any, that come in aid of the kings officer, &c. to doe his office, be slain, it is murder.

3. In respect of the person killing. If A assault B to rob him and in resisting A killeth B this is murder by malice implied, albeit he never saw or knew him before. If a prisoner by the dures of the gaoler, commeth to untimely death, this is murder in the gaoler, and the law implieth malice in respect of the cruelty. And this is the cause, that if any man dieth in prison, the coroner ought to sit upon his body, to the end it may be inquired of, whether he came to his death by the dures of the gaoler, or otherwise: all which appeareth in Britton: and this sitting of the coroner continueth till this day.

If the sherif, or other officer, where he ought to hang the party attainted, according to his judgement and his charge, will against the law, of his own wrong, burn or behead him, or *à converso*; the law in this case implieth malice in him. Neither can the king by any warrant under the great seal alter the execution, otherwise then the judgement of law doth direct: for it is a maxime in law, *non alio modo puniatur quis, quam secundum quod se habeat condemnatio*.

And it is to be known, that in case of treason and felony, there is an expresse judgement, and an implied judgement: expresse, when upon appearance, &c. an expresse judgement is given against him, *quod suspendatur per collum*. Implied, when the offender makes default, and is outlawed, where the judgement is, *ideo utlagetur*; or in case of abjuration, *quia abjuravit regnum*: and yet the like execution shall be in case of outlawry or abjuration, as in case of an expresse judgement: and so it was adjudged in case of a person outlawed for felony, he ought to be hanged untill he be dead, and cannot be beheaded, * and the like is in case of abjuration. But in case of high treason, because beheading is parcell of the judgement, the king may pardon all the residue of the execution except that: for seeing the king may pardon the whole execution, he may pardon any part, or all, saving part. If a lieutenant, or other that hath commission of marshall authority, in time of peace hang, or otherwise execute any man by colour of marshall law, this is murder, for this is against Magna Charta cap. 29. and is done with such power and strength, as the party cannot defend himself; and here the law implieth malice. *Vide Pasch. 14. E. 3.* in Scaccario the abbot of Ramsays case in a writ of error in part abridged by Fitzh. tit. Scire fac. 122. for time of peace.

* Thom. countee de Lancaster being taken in an open insurrection, was by judgement of marshall law put to death, in anno 14 E. 4. This was adjudged to be unlawfull, *eò quod non fuit arrainiatus*,

rainiatur, seu ad responſionem poſitus tempore pacis, eò quòd cancellaria, et aliæ curiæ regis fuerunt tunc apertæ, in quibus lex ſubat unicuique, prout fieri conſuevit, quòd contra cartam de libertatibus cum dictus Thomas fuit unus parium et magnatum regni non imprifnetur, &c. Nec dictus rex ſuper eum ibit, nec ſuper eum mittet, niſi per legale iudicium parium ſuorum, &c. tamen tempore pacis abſque arraniamento, ſeu reſponſione, ſeu legali iudicio parium ſuorum, &c. adjuuicatus eſt morti.

[53]

Within a year and a day.] How this year and a day ſhall be accounted, is to be ſeen. If the ſtroke, or poyſon, &c. be given the firſt day of January, the year ſhall end the laſt day of December: for though the ſtroke, or poyſon, &c. were given in the afternoon of the firſt day of January, yet that ſhall be accounted a whole day, for regularly the law maketh no fraction of a day: and the day was added, that there might be a whole year at the leaſt after the ſtroke, or poyſon, &c. for if he die after that time, it cannot be diſcerned, as the law preſumes, whether he died of the ſtroke or poyſon, &c. or of a natural death; and in caſe of life the rule of law ought to be certain. But ſeeing the year and day in the caſe of murder and homicide, muſt be accounted *apres le fait*, after the deed, if a man be ſtricken or poyſoned, &c. the firſt of January, and he dieth of that ſtroke or poyſon the firſt day of May, whether ſhall the year and day be accounted after the ſtroke or poyſon given, or after the death? and it ſhall be accounted after the death, for then the man was murdered, and not after the ſtroke or poyſon given, &c. both in the indiſtment at the ſuit of the king, and in the appeal at the ſuit of the party. And ſo it hath been often adjudged contrary to the opinion of juſtice Stanford. A murderer half a year after the murder is received, and aided by another, this acceſſory may be indiſted or appealed within the year after he became acceſſory, though it be after the year, that the murder was committed, and ſhall be tryed when the principall is attainted.

See the ſtatute of Glouceſt.
6 E. 1. ca. 9.
3 H. 7. ca. 1.
3 E. 3. Cor. 303.
Lib. 5. fo. 1. in Cleytons caſe.

Lib. 4. fo. 41, 42. in Heydons caſe.

Stanf. Pl. Cor. 63.
26 Aff. p. 52.

If a murder be committed in the day time in a town not incloſed, and the murderer not apprehended, the townſhip ſhall be amerced, but if incloſed, whether the murder be in the night, or day, the town ſhall be amerced. They that are preſent when any man is ſlain, and doe not their beſt indeavour to apprehend the murderer, or manſlayer ſhal be fined and imprifoned. What judgment a felon attainted ſhall have, and what he ſhall forfeit; ſee the firſt part of the Inſtitutes, ſect. 747. and here, cap. Judgement and Execution.

2 H. 7. c. 1. ſtat. 1.
3 E. 3. cor. 299.
8 E. 2. cor. 39.
Inter leges regis Edw. cap. 6.
Æthelſtani cap. 1. Ed. cap. 6. &c.

* Nota that before the reign of H. 1. the judgement for felony was not always one, but king H. 1. ordained by parliament, that the judgement for all manner of felonies ſhould be, that the perſon attainted ſhould be hanged by the neck till he be dead, which continueth to this day. See more for murder in the chapter of Monomachia.

* 9 H. 1. Hovanden, anno 1108. Simon Dun. Rad. and Floren. Wigorn. Hollenſh. 45.

C A P. VIII.

OF HOMICIDE.

HOMICIDIUM *ex vi termini* comprehendeth petit treason, murder, and that which is commonly called manslaughter: for *homicidium est hominis cadium*, and *homicidium est hominis occiso ab homine facta*. Therefore the right division of homicide is: that of homicides, or manslaughter, some be voluntary, and of malice forethought; as petit treason, and murder of another, and murder of himself. Of the two former we have spoken; and of murder of himself we shall speak hereafter. Of manslaughters, some be voluntary, and not of malice forethought: of these some be felony (as shall be shewed hereafter) and some be no felony; of which, some be in respect of giving back inevitably in defence of himself, upon an assault of revenge: and some without any giving back; as upon the assault of a thief or robber upon a man in his house, or abroad: Some upon the assault of one, that is under custody; as the sherif, or gaoler assaulted by his prisoner. Some in respect that he is an officer or minister of justice, without any assault in execution of his office, or lawfull warrant. And lastly, some homicides, that be no felony, be neither forethought, nor voluntary; as manslaughter by misadventure, *per infortunium*, or *casu*. And some of these, that be no felony, are causes of forfeiture of a man's goods, and some be not: and of these severall branches in their order. And first of murder of a man's self, who commonly is called *felo de se*.

3 E. 3. cor. 290.
289. 312.

Britton cap. 7.

Felo de se.

Felo de se is a man, or woman, which being *compos mentis*, of sound memory, and of the age of discretion, killeth himself, which being lawfully found by the oath of twelve men, all the goods and chattels of the party so offending are forfeited.

Regula.

Now let us peruse the severall branches of this description, *maius est delictum seipsum occidere, quam alium*.

^a Rot. Claus.

1 E. 1. m. 7.

Rot. Claus.

6 E. 1. Alma

filia Roberti de

Keston. 3 E. 3.

cor. 324.

Rot. Escheat.

anno 47 E. 3.

nu. 17. Ricus

Algate.

^b 8 E. 2. cor.

422. 22 E. 3.

cor. 244. Pl.

Com. 260.

Being compos mentis.] ^a If a man lose his memory by the rage of sickness or infirmity, or otherwise, and kill himself while he is not *compos mentis*, he is not *felo de se*: for, as he cannot commit murder upon another, so in that case he cannot commit murder upon himself. ^b If one during the time that he is *non compos mentis* give himself a mortall wound, wherof he, when he hath recovered his memory, dieth, he is not *felo de se*: because, the stroke which was the cause of his death, was given when he was not *compos mentis*: *et actus non facit reum, nisi mens sit rea*. If a man give himself a wound, intending to be *felo de se*, and dieth not within the year and day after the wound, he is not *felo de se*.

Of the age of discretion.] Hereof we have spoken before treating of murder.

Kill himself.] ^c And this is often voluntary, and sometime not voluntary. If A. give B. such a stroke as he felleth him to the ground, B. draweth his knife, and holds it up for his own defence:

^c 44 E. 3. 44.
3 E. 3. cor. 286.
& 297.

fence: A. in hast meaning to fall upon B. to kill him, falleth upon the knife of B. whereby he is wounded to death, he is *felo de se*: for B. did nothing but that which was lawfull in his own defence.

Lawfully found.] ^d No goods be forfeited, untill it be lawfully found by the oath of twelve men, that he is *felo de se*: and this doth belong to the coroner *super visum corporis*, to inquire thereof: and if it be found before the coroner *super visum corporis*, that he was *felo de se*, ^a the executors or administrators of the dead shall have no traverse thereunto. And this is the reason, that no man can prescribe to have felons goods, because they are not forfeited, until it be found of record, that he is *felo de se*.

^b If a man be *felo de se*, and is cast into the sea, or otherwise so secretly hidden, as the coroner cannot have the view of the body, and by consequence cannot inquire thereof: in this case it may be inquired thereof by the justices of peace of that county; for they have power by their commission to inquire of all felonies. But if it be found before them, the executors or administrators of the dead may have a traverse thereunto, but not to the indictment taken before the coroner *super visum corporis*, as before is said: and so hath it been resolved. And so in the case abovesaid may the kings bench enquire thereof, if the felony be committed in the county where the kings bench sit, and the executors or administrators of the dead may traverse the same.

Are forfeited.] Albeit ^c Bracton was of opinion, that if a man that was *reus alicujus criminis captus sit pro eodem, utpote pro morte hominis, vel cum furto manifesto, vel quod utlegatus sit, et metu pœnæ imminentis mortis mortem sibi consciiverit, hæredem non habebit, quia sic convincitur feloniam prius factam, viz. furtum, mors hominis, vel hujusmodi, et conscientia metus in reo pro confesso habetur. Aliud erit si non sit in crimine deprehensus, &c. non debet in aliquo casu exheredatio fieri, nisi præcedat crimen, propter quod periculum mortis vel membrorum sustineri debet, &c.* But the law makes no such diversity: ^d for *felo de se*, whatsoever offence he hath committed (whereof he was not in his life time attainted) shall forfeit no lands, but his goods and chattels only. ^e And so saith Britton, *En case ou home est felon de soy mesme, soient ses chateaux judges nous come chateaux de felon, le heritage ne quident remaine as heires.* For no man can forfeit his land without an attainder by course of law.

A ^f villain giveth himselfe a mortall wound, the lord seifeth his goods, the villain after dieth of the wound within the year and the day, the goods are forfeit.

And herein ^g there is a diversity between chattels personels in action, and in possession: for if a debt be owing to two, unlesse it be in case of two joint merchants, and the one is *felo de se*, he doth forfeit the whole: but otherwise it is of goods in possession, for there he forfeiteth but his part.

A lease ^h is made for years to the husband and wife, the husband drowneth himself, the lease is forfeited, as you may read at large in Plowdens Commentaries.

Now let us pursue the branches into which bloody homicide did spend and empty itselfe.

Some manslaughters be voluntary, and not of malice forethought, upon some sudden falling out. *Delinquens per iram provocatus*

^d Pl. Com. 360.

^b.
[55]

^a Stanf. pl. cor.
183. d.

^b Hil. 37 Eliz.
in the kings
bench by the
whole court, in
the case of one
Laughton of
Cheshire.
See 8 E. 2. cor.
412.
3 E. 3. cor. 312.
fi. e.
Stanf. pl. cor.
184.

^c 8 E. 2. cor.
426. 44 E. 3. 44.
22 E. 3. cor. 259.
3 E. 3. cor. 301.
3 E. 3. 3. cor.
362. 5 Mar.
Dier. 160.
9 Eliz.
Dier. 262. Bract.
lib. 3. f. 150.
Fleta, lib. 2.
c. 34.

^d Pl. com. 261.
^a. & ^b. per
tous les justices.
^e Britton, cap. 7.
Custum. de
Norm. cap. 21.
^f Pl. com. 260. b.

^g 8 E. 4. 4.
Pl. com. 259. b.

^h Pl. com. 260.
Dier, 2 Mar. 108.

vocatus puniri debet mitius. And this for distinction sake is called manslaughter. There is no difference between murder, and manslaughter; but that the one is upon malice forethought, and the other upon a sudden occasion: and therefore is called chance-medley. As if two meet together, and striving for the wall the one kill the other, this is manslaughter and felony. And so it is, if they had upon that sudden occasion gone into the fields and fought, and the one had killed the other: this (as hath been said) had been but manslaughter, and no murder; because all that followed, was but a continuance of the first sudden occasion, and the heat of the blood kindled by ire was never cooled, till the blow was given, *et sic de similibus.*

Manslaughterⁱ is felony, and hereof there may be accessories after the fact done: but of murder, there may be accessories, as well before, as after the fact.

Some be^k voluntary, and yet being done upon an inevitable cause are no felony. As if A. be assaulted by B. and they fight together, and before any mortall blow given A. giveth back, untill he commeth unto a hedge, wall, or other strait, beyond^{*} which he cannot passe, and then in his own defence, and for safeguard of his owne life killeth the other: this is voluntary, and yet no felony, and the jury that finde, it was done *se defendendo*, ought to finde the speciall matter. ^a And yet such a precious regard the law hath of the life of man, though the cause was inevitable, ^b that at the common law he should have suffered death: and though the statute of Gloucester save his life, yet he shall forfeit all his goods and chattels. ^c Hereof there can be no accessories, either before or after the fact, because it is not done *felleo animo*, but upon inevitable necessity *se defendendo*. If A. assault B. so fiercely and violently, and in such a place, and in such manner, as if B. should give back, he should be in danger of his life, he may in this case defend himselfe; and if in that defence he killeth A, it is *se defendendo*, because it is not done *felleo animo*: for the rule is, when he doth it in his own defence, upon any inevitable cause, *Quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur.*

Some without any giving back to a wall, &c. or other inevitable cause. ^d As if a thiefe offer to rob or murder B. either abroad, or in his house, and thereupon assault him, and B. defend himselfe without any giving back, and in his defence killeth the thief, this is no felony; for a man shall never give way to a thief, &c. neither shall he forfeit any thing. ^e And so it is declared by the statute of 24 H. 8. Likewise ^f if a prisoner assault the gaoler, the gaoler is not by law inforced to give back: but if in defence of himselfe he kill the prisoner, this is no felony.

^g So if any officer, or minister of justice, that hath lawfull warrant, and the party assault the officer or minister of justice, he is not bound by law to give back, but to carry him away: and if in execution of his office he cannot otherwise avoid it, but in striving kill him, it is no felony. And in that case the officer or minister of justice shall forfeit nothing, but the party so assaulting or offering to flye away, and is killed, shall forfeit his goods and chattels.

^h *Viccomes seu balivus domini regis, qui interfecit duos latrones non permittentes*

ⁱ Lib. 4. fol. 44.
Bibiths case

^k 15 E. 3. cor.
116.

15 Aff. p. 7.

43 Aff. 31. See
the stat. of Gloc.
cap. 39.

3 E. 3. cor. 184.
286. & 297. 305.
& 361.

See hereafter,
ca. 101. of
Judgement and
Execution.

Verb. Of death
of a man *se de-*
defendendo.

* [56]

^a 43 Aff. 31.

Rot. Parl.

3 R. 2. nu. 18.
John Imperials
case.

^b 21 E. 3. 17.

Gloc. cap. 9.

4 H. 7. 2.

^c Lib. 4. fo. 44.
Bibiths case.

Bracton.

^d Lib. 5. fo. 91.
Semayns case.

26 Aff. p. 23.

32. 29 Aff. p. 23.

3 E. 3. cor. 305.
& 330.

22 E. 3. cor.

261. 21 H. 7. 39.

^e 24 H. 8. cap. 5.

^f 22 Aff. p. 55.

^g 3 E. 3. cor. 290.

22 E. 3. cor. 261.

M. 22 E. 3. co-
ram rege Rot.

181. Eborum.

Rot. libert. an-
no 1 & 2 E. 1.
m. 2.

^h Pasch. 16 E. 3.
Coram rege.
Rot. 131. Norff.

permittentes se justificari in sui defensionem, et non ex feloniam, seu malitia, acquietatur.

ⁱ If at a just or turnement, or at the play with sword and buckler by the kings commandement, one doth kill another, this is no felony. ^k In the reigne of king H. 2. it was enacted, that if in such case one was slaine, it should be no felony, for that in friendly manner they contended to try their strength, and to be able to doe the king service in that kinde, as occasion should be offered.

There is an homicide, that is neither forethought, nor voluntary. ^l As if a man kill another *per infortunium, seu casu*, that is homicide by misadventure. *De amputatore arborum, qui cum ramum projiceret, inscius occidit transeuntem: aut cum quis pilam percusserit, &c. ex cujus ictu occisus est, tales de homicidio non tenentur.* Homicide by misadventure, is when a man doth an act, that is not unlawfull, which without any evill intent tendeth to a man's death.

Unlawfull. ^m If the act be unlawful it is murder. As if A. meaning to steale a deere in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure, and no felony.

ⁿ So if one shoot at any wild fowle upon a tree, and the arrow killeth any reasonable creature afar off, without any evill intent in him, this is *per infortunium*: for it was not unlawful to shoot at the wilde fowle: but if he had shot at a cock or hen, or any tame fowle of another mans, and the arrow by mischance had killed a man, this had been murder, for the act was unlawfull.

Without any evil intent. ^o If a man knowing that many people come in the street from a sermon, throw a stone over a wall, intending only to feare them, or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party slaine. For the killing of any by misadventure, or by chance, albeit it be not felony, *quia voluntas in delictis, non exitus spectatur*; yet he shall forfeit therefore all his goods and chattels, to the intent that men should be wary so to direct their actions, as they tend not to the effusion of mans blood,

Nec veniam effuso sanguine casus habet.

Nota, Homicide is called chancemedley, or chancemelle, for that it is done by chance (without premeditation) upon a sudden brawle, shuffling, or contention: for meddle or melle (as some say) is an ancient French word, and signifieth brawle, or contention. But I take it that the French word is *mesle*, which signifying shuffling or contending, and by corruption we changing the S to D, doe call it *medle*, the S being not pronounced, whereof we have made *medletum*. So as killing of a man by chance-medle, is killing of a man upon a sudden brawle or contention by chance, for the word [*medle* or *melle*,] whereof we have made a Latin word *medletum* or *melletum*, see Glanvill, lib, 1. cap. 2. *cognoscere de medletis, de verberibus, de plagis*: that is, of brawling, or brabbling, of

ⁱ 11 H. 7. 22. Vid. hereafter. cap. Against riding and going armed.

^k Mirror, cap. 1. § 13. Des adventures.

^l Bract. lib. 3. fo. 136. b.

See the stat. of Gloc. ca. 9.

Marl. cap. 25.

Bract. lib. 3. 120.

Brir. ca. 7. fo.

15. Fleta, lib. 1.

ca. 30. Mir.

ca. 1. § 9.

^m Bract. lib. 3.

120. b. Sed erit

distinguendum

utrum quis dede-

rit operam rei

licite vel illicit-

te, &c.

ⁿ 3 E. 3. cor.

354. 2 H. 4. 18.

11 H. 7. 23. a.

[57]

Marlbr. ca. 25.

D. Medletis.

battery, of wounding: the first in words, the other two in strokes, &c. in ancient time expressed by these two Saxon words, viz. *flit*, a *flitan*, to brawle; and *flit*, which we retain still to fight when it proceeds to blowes. *Unde flitwit, flitwite, flitwite, &c.*

And thus much of homicide committed by man. See in the next chapter of deodands, of another kinde of killing of a man.

C A P. IX.

O F D E O D A N D S.

^a 8 E. 2. Cor.
403. 8 E. 2. Ibid.
189. A mill
wheel. Fleta lib.
1. ca. 25. quic-
quid mobile sit
in molendino.
Mirror c. 1. §
13. 12 R. 2.
Cor. 20. a masse
of earth in a
mine.
^b Bract. lib. 3.
fo. 120. b. a
bove, cane, &c.
^c Bracton, lib.
3. fo. 122. a.
Britton, fo. 6.
15 Mirror, cap.
1. § 3.
Fleta, li. 1. ca.
25. 45 E. 3. 2. b.
Vide 4 E. 1.
stat. officium co-
ron. 6 E. 6. Dier,
77. b. 61. a.
Quæ movent ad
mortem sunt
Deo danda.
2 Mar. ibid.
107. b. Kelway,
21 H. 7. fo. 8.
^d Lib. 5. fo. 110.
b. Foxleys case
accord. And this
is the reason
they cannot be
claimed by pre-
scription. 45 E.
3. ubi supra.
Fleta ubi sup.
^e 8 E. 2. cor. 389.
^f Exod. 2. 28.
*[58]
Doct. & Stud.
li. 2. 156. b.
Br. Forf. i. 112.
All our ancient
authors ubi supra
Rot. Parl. 51
F. 3. nu. 73.

DEODANDS when any ^a moveable thing inanimate, or ^b beast animate, doe move to, or cause the untimely death of any reasonable creature by mischance ^c in any county of the realm (and not upon the sea, or upon any salt water) without the will, offence, or fault of himself, or of any person. ^d They being so found by lawful inquisition of twelve men, being *precium sanguinis*, the price of blood, are forfeited to God, that is to the king, Gods lieutenant on earth, to be distributed in works of charity for the appeasing of Gods wrath.

And it is to be observed, that there is a diversity, as concerning the deodand, when the party slain is within the age of discretion, viz. of 14. years, and when he is above the age of discretion. For when he is slain by fall from a cart, horse, mill, &c. and is within the age of discretion, there is no deodand, as it is adjudged ^e in 8 E. 2. tit. coron. 389. But otherwise it is, if an ox, horse, bull, or the like, doe kill any within the age of discretion, there the same are deodands.

And this law concerning deodands, is grounded upon the law of God, Exodus 2. vers. 28. *Si bos cornu percusserit virum, aut mulierem, et mortui fuerint, lapidibus obruetur.* See justice Stanford, lib. 1. cap. 12. which need not here to be recited. If A. killeth a man with the sword of B. the sword shall be forfeit to the king ^a as a deodand, because *movet ad mortem*, and for default of safe keeping of the same by the owner.

But now that we have cited, and referred you to our books of law already known, and published: let us cast our eye upon some records of parliament concerning deodands, of, or out of ships or other vessels upon rivers, or waters, fresh or salt, the law being clear, that in *aqua dulci* there may be deodands, but in the sea, or in *aqua salsa*, being any arm of the sea, though it be in the body of the county, there can be no deodand of the ship, or any part thereof, though any be drowned out of it; because, though the arm of the sea be within the body of the county, the ship or other vessel is subject to such dangers upon the raging waves in respect of the wind and tempest. And this diversity doth notably appear in the parliament roll. Amongst the petitions in parliament it is desired, that if it happen any man, or boy to be drowned by a fall out of any ship, boat, or vessel, they shall be no deodands. Whereunto the king upon great advice, and conference with his judges and

councell

councell learned (as always the king doth to petitions in parliament) made answer, The ship, boat, or vessel being upon * the sea shall be adjudged no deodand, but being upon a fresh river, it is a deodand, but the king will shew favour.

* The arm of the sea is included herein.

See the like petitions in other rolls of parliament *anno* 1 R. 2. nu. 106. 4 R. 2. nu. 33. 1 H. 5. nu. 35. &c. but never obtained more, then the common law gave in these cases.

C A P. X.

OF BUGGERY, or SODOMY.

IF any person shall commit buggery with mankind, or beast; by authority of parliament this offence is adjudged felony without benefit of clergy. But it is to be known, (that I may observe it once for all) that the statute of 25 H. 8. was repealed by the statute of 1 Mar. whereby all offences made felony or premunire by any act of parliament made since 1 H. 8. were generally repealed, but 25 H. 8. is revived by 5 Eliz.

25 H. 8. ca. 6.
5 Eliz. ca. 17.
1 Mar. ubi sup.

Buggery is a detestable, and abominable sin, amongst christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast.

Horrendum illud peccatum.
5 El. ca. 17.

Bugeria is an Italian word, and signifies so much, as is before described, *pæderastes* or *paiderestes* is a Greek word, *amator puerum*, which is but a species of buggery, and it was complained of in parliament, that the Lumbards had brought into the realm the shamefull sin of sodomy, that is not to be named, as there it is said. Our ancient authors doe conclude, that it deserveth death, *ultimum supplicium*, though they differ in the manner of the punishment. Britton saith, that sodomites, and miscreants shall be burnt, and so were the sodomites by Almighty God. Fleta saith, *peccantes et sodomitæ in terra vivi confodiantur*: and therewith agreeth the Mirror, *pur le grand abhominacion*, and in another place he saith, *Sodomie est crime de majestie, vers le roy celestre*. But (to say it once for all) the judgement in all cases of felony, is, that the person attainted be hanged by the neck, untill he, or she be dead. But in ancient times, in that case, the man was hanged, and the woman was drowned, whereof we have seen examples in the reign of R. 1. And this is the meaning of ancient franchises granted *de furca, et fossa*, of the gallows, and the pit, for the hanging upon the one, and drowning in the other, but *fossa* is taken away, and *furca* remains.

Rot. Parl. 50 E.
3. nu. 58.

Britton ca. 9.
Gen. 19. 9.
Rom. ca. 1. 17.
F. N. B. 269. a.
Fleta li. 1. ca.
37. Mirror ca. 4.
§. de majesty,
ca. 1. § 15. &
cap. 2. sect. 11.

Cum masculo non commiscearis coitu fæmineo, quia abominatio est. Cum omni pecore non coibis, nec maculaberis cum eo: mulier non succumbet juvamento, nec miscebitur ei, quia scelus est, &c.

[59]

Levit. 18. 22,
23. 1 Tim. 1. 10.

The act of 25 H. 8. hath adjudged it felony, and therefore the judgement for felony doth now belong to this offence, viz. to be hanged by the neck till he be dead. He that readeth the preamble

of this act, shall find how necessary the reading of our ancient authors is: the statute doth take away the benefit of clergy from the delinquent. But now let us peruse the words of the said description of buggery.

Detestable and abominable.] Those just attributes are found in the act of 25 H. 8.

Amongst Christians not to be named.] These words are in the usuall indictment of this offence, and are in effect in the parliament roll of 50 E. 3. *ubi supra*, nu. 58.

By carnall knowledge, &c.] The words of the indictment be, *contra ordinationem creatoris, et naturæ ordinem, rem habuit veneream, dictumque puerum carnaliter * cognovit, &c.* So as there must be *pene- tratio*, that is, *res in re*, either with mankind, or with beast, but the least penetration maketh it carnall knowledge. ^a See the indict- ment of Stafford, which was drawn by great advice for committing buggery with a boy, for which he was attainted and hanged.

^b The sodomites came to this abomination by four means, viz. by pride, excesse of diet, idlenesse, and contempt of the poor. *Otiosus nihil cogitat, nisi de ventre et venere.* Both the agent and consentient are felons: and this is consonant to the law of God, ^c *Qui dormierit cum masculo coitu fæmineo, uterque operatus est nefas, et morte moriatur.* And this accordeth with the ancient rule of law, *agentes et consentientes pari pœna placentur.*

Emissio seminis maketh it not buggery, but is an evidence in case of buggery of penetration: and so in rape the words be also, *carnaliter cognovit*, and therefore there must be penetration; and *emissio seminis* without penetration maketh no rape. *Vide* in the chapter of Rape. If the party buggered be within the age of discretion, it is no felony in him, but in the agent only. When any offence is felony either by the common law, or by statute, all accessories both before and after, are incidently included. ^d So if any be present, abetting and aiding any to do the act, though the offence be personall, and to be done by one only, as to commit rape, not only he that doth the act is a principall, ^e but also they that he present, abetting, and aiding the misdoer, are principalls also, which is a proof of the other case of Sodomy.

Or by woman.] This is within the purvien of this act of 25 H. 8. For the words be, if any person, &c. which extend as well to a woman, as to a man, and therefore if she commit buggery with a beast, she is a person that commits buggery with a beast, to which end this word [person] was used. And the rather, for that some- what before the making of this act, a great lady had committed buggery with a baboon, and conceived by it, &c.

There be four sins in holy scripture called *clamantia peccata*, cry- ing sins, whereof this detestable sin is one, expressed in this dis- tichon.

*Sunt vox clamorum, vox sanguinis, et sodomorum,
Vox oppressorum, merces detenta laborum.*

* This is ground-
ed upon the
word of God.
viz. Gen. 19. 4.
5. Judges, 19.
22. Ut cognos-
camus eos.
^a Coke, lib. Intr.
352. Mich. 5
Ja. Coram rege.
^b Ezk 16. 49.
Gen. 18. 29.
Deut. 29. 23.
Esay, 13. 19.
Jer. 23. 14. 49.
18. 50. 4.
Luke, 17. 28,
29. 2 Pet. 2. 6.
Jud. verl. 7.
Rom. 1. 26, 27.
Sapient. 10. 6, 7.
^c Levit. 20. 13.
1 Cor. c. 6. v. 10.
^d 3 & 4 P. &
Mar. justice Da-
lisons Reports.
Stanf. Pl. cor.
Pl. com. 97.
^e 11 H. 4. 13.
See the 2. part of
the Institutes in
the exposition
upon the statute
o. W. 1. ca. 13.
and W. 2. ca. 34.

C A P. XI.

O F R A P E.

RAPE is felony by the common law, declared by parliament for the unlawfull and carnall knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will, or against her will, and the offender shall not have the benefit of clergy.

What offence this was at the common law, and what acts of parliament have been enacted concerning the same; see in the second part of the Institutes in the exposition upon the statute of W. 1. ca. 13. and W. 2. ca. 34. and the first part of the Institutes, sect. 190. 7 H. 6. 2. 22 E. 4. 22. 6 H. 7. 4. b.

^a The doubt that was made in 14 Eliz. at what age a woman child might be ravished, was the cause of the making of the act of 18 Eliz. ca. 6. for plain declaration of the law. [That if any person should unlawfully know and abuse any woman-child under the age of ten years, every such unlawful and carnall knowledge should be felony, and the offender therein being duly convicted, shall suffer as a felon without allowance of clergy.]

^c Although there be *emissio seminis*, yet if there be no penetration, that is, *res in re*, it is no rape, for the words of the indictment be, *carnaliter cognovit*, &c.

^d In the parliament rolls we read what detestation hath been had of this hainous offence. At the petition of Isabell late the wife of John Botiler of Beausie in the county of Lancaller knight, which Isabell one William Pull of Wirrall in the county of Chester gent, shamefully did ravish. It is enacted by authority of parliament, that if William Pull doe not yeeld himself after proclamation made against him, that he shall be taken as a traitor attainted.

^e The same Isabell by another petition shewed, how the said William by dures and menace of imprisonment inforced her to marry him, and by colour thereof ravished her, for the which she prayeth her appeal, which to her is granted.

^f Margaret late the wife of sir Thomas Malefant knight, made the like complaint against one Lewis Leyson alias Gethey a Welchman. Against whom the like order is taken, as was for the said Isabell: onely where the rape was committed in Wales, it is enacted, that the same shall be tried in Somersetshire.

^g Upon complaint of Henry Beaumont son and heir of sir Henry Beaumont knight, and Charles Vowell esquire, &c. against one Edward Lancaster of Skipton in Craven esquire, for taking away dame Joan Beaumont the late wife of the said Sir Henry, being lawfully married to the said Charles, and for that the said Edward married the said dame Joan against her will, and ravished her. Against Edward Lancaster and others, remedy is given by appeal, and further ^h upon occasions happening thereupon, the statute

Deut. 22. 25.
Inter leges Alve-
redi, cap. 25.

Canuti 49, 50.

See W. 2. c. 34.

W. 1. ca. 13.

Rot. Parl. 8. E.

2. & Rot. Claus.

8 E. 2. m. 3.

Quia in casu

quando aliquis,

&c. 6 R. 2. ca. 6.

18 Eliz. cap. 6.

Lib. 11. fo. 39.

Alexander Poul-

ters case.

See the 1. part of

the Institutes.

sect. 190.

Mich. 19 E. 3.

Coram rege.

Rot. 159. Lon-

don quod ipsam

de puellagio sua

felonicè et tota-

liter defloravit.

7 H. 6. 2.

22 E. 4. 22.

6 H. 7. 4. b.

^a Di. 14 El.

f. 304.

^b 18 El. ca. 6.

^c See before in

the next prece-

ding chapter of

buggery.

^d Rot. Parl.

15 H. 6. nu. 14.

^e In the same

roll nu. 15.

^f Rot. Parl.

18 H. 6. nu. 28.

^g Rot. Parl.

31 H. 6. nu. 72.

^h 31 H. 6. ca. 9.

statute of 31 H. 6. was made, which giveth remedy to a woman enforced to be bound by statute or obligation, as by the act it appeareth.

It is read in story, that chaste Lucretia being ravished, she was found in extreme heavinesse, and it was demanded of her, *Salva?* she answered, *Quomodo mulier salva esse potest læsa pudicitia?* and yet thereof it is truly said, *Duo fuerunt, et unus commisit adulterium.*

Gen. 34.

2 Sam. 13. 14.
19.

In the holy history you shall read, *Dinam cum vidisset Sichem filius Hemor Hevei princeps tertæ illius, adamavit et rapuit, &c.* Observe well what followed thereupon. Likewise, *Ammon prevalens viribus suis oppressit Thamar sororem suam, et cubavit cum ea, &c. quæ aspergens cinerem capiti suo, scissa talari tunica, impositis manibus super caput suum ibat ingrediens et clamans &c.* And observe also the end of the offender.

C A P. XII.

[61]

Felony for carrying away a Woman against her Will, &c.

Exod. 21. 16.

Deut. 24. 7.

* 1 Tim. 1. 10.

WE have thought good next after Buggery and Rape, to speak of the stealing of women, because the * apostle doth rank, after the sodomite, him that is plagiarius, so called, because *lege Flavia plagis damnetur.* And we will begin with the statute of 3 H. 7. cap. 2.

3 H. 7. c. 2.

39 El. cap. 9.

Where women, as well maidens, as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparant unto their ancestors, for the lucre of such substances, been oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to other by their assent, or defoyled, to the great displeasure of God, and contrary to the kings laws, and disparagement of the said women, and utter heavinesse, and discomfort of their friends, and to the evill ensample of all other: it is therefore ordained, established, and enacted by our sovereign lord the king, by the advice of the lords spirituall and temporall, and the commons in the said parliament assembled, and by authority of the same, That what person or persons from henceforth that taketh any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, and abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony. And that such misdoers, takers, and procurators to the same, and receytors, knowing the said offence

offence in form aforesaid, be henceforth reputed and judged as principall felons. Provided alway that this act extend not to any person taking any woman, only claiming her as his ward, or bondwoman.

This act on the offenders part doth extend to all degrees, and to all persons, but extendeth not to all women: for on the womans part four things are necessarily required to make the offence felony. First, that the maid, wife, or widow have lands or tenements, or moveable goods, or be an heir apparent. Secondly, that she be taken away against her will. Thirdly, that she be married to the misdoer, or to some other by his consent, or be defiled, (that is, carnally known) for if these concur not, the misdoer is no felon within this statute, but otherwise to be punished. And so it was resolved, 3 & 4 Ph. and Mar. And after resolved by all the judges of England upon advised consideration of this act of 3 H. 7. and upon consultation, and conference between them, as the lord Dier hath reported under his own hand, which I have seen, but the report thereof is omitted in the print; and the indictments grounded upon this statute, are according to this resolution. Fourthly, that she be not ward, or bondwoman to the person that taketh her, or causeth her to be taken only as his ward, or bondwoman.

3 & 4 Ph. and Mar. justice Darlsons report. Mich. 26 Eliz. Dier manuscript. And so resolved by parliament. in anno 39 El. cap. 9.

Nota, quia raro.

[62]

By this act, not only the takers, but the procurers, abettors of the felony, and receivers of the said woman wittingly, knowing the same, be all adjudged as principall felons: the like whereof we finde not in any other statute, that we remember. But by a construction of the common law, they that receive the misdoers, and not the woman, are accessories; for this act maketh the receivers of the woman, &c. principals.

For the odiousnesse of this offence, the benefit of clergie is taken away from all the offenders against the said act. Vid. Kelway, and Stanford.

39 Eliz. cap. 2, Kelway, 81. b. Stanf. pl. cor. 37. b. 4 & 5 Ph. and Mar. cap. 8. Hil. 34. Eliz. lib. 3. fo. 37. Ratiocines case.

See a good and profitable statute made for such as take away maidens or women children, &c. within the age of sixteene yeares (though it be not against their will) without consent of parents, &c. and a penalty imposed for deflowring, or contracting matrimony with such maids or women-children; and further, the forfeiture which such maid or woman-childe undergoe, which consent to such contract, &c. But because we are now to speak of felonies, whereunto that act extends not, we refer the reader to the statute itselfe. Only we will adde a case which we find in the parliament roll.

The Lady Nevill of Effex complained in parliament, that John Brewse and others brake her house at London, and violently took thereout Margerie the daughter of John Nierford her sonne (by her first husband) and carried the said Margerie away to the house of Sir Robert Howard knight; and they kept away the said Margerie, to the end she should not pursue in court christian, for the annulation of a contract of matrimony, against the said John Brewse. This was holden so great an offence, as the said Sir Robert was committed by the lords to the Tower of London, and he after found surety, and promised to do his uttermost to bring forth the said Margery by a day prefixed, or else to yield himself prisoner to the Tower

Rot. Parl. 2 R. 2. nu. 34.

Tower againe: but it seems the maid was restored to her mother againe, &c. for I find no further prosecution of that cause. See hereafter, cap. 45, *in fine*. 43 Eliz. cap. 13.

C A P. XIII.

Of Felonie for cutting out of Tongues, and putting out of Eyes, &c.

5 H. 4. ca. 5.

IF any man doe cut out the tongue, or put out the eyes of any of the kings lieges, of malice prepensed, it is felony.

The mischief before this statute was, that when one had been beaten, wounded, maimed, or robbed, &c. the misdoers, to the end that the party grieved might not be able to accuse them, did cut out their tongues, or put out their eyes, pretending the same to be no felony: and therefore it is ordained and established to be felony by this act.

Here it is to be observed, that where it doth appear by the preamble of this law, that this offence had been before this act daily done: this law did so terrifie offenders, as we remember not, that we have read in any book or record, any to be indicted, &c. upon this law, above one at the most. And of all statutes these are to be preferred, which prevent offences before they be done, before those which punish them after they be done. And therefore in the making of this law there was *salutaris severitas, et beata securitas*.

Malice prepensed.] That is, voluntary and of set purpose, though it be done upon a sudden occasion: for if it be voluntary, the law implyeth malice.

Bract. lib. 3.
fo. 144. b.Rot. Claus.
anno 13 H. 3.
m. 9.

[63]

Fleta, lib. 1. ca.
38. Mir. ca. 1.
§ 9. De homicidio. See hereafter ca. 53. of Mayhem. 37 H. 8. cap. 6. Mir. cap. 4. De artic. de Eire,

We read in Bracton, that the cutting off of a mans privie members was felony by the common law: for he saith, *Quid dicitur si quis alterius virilia absciderit, et illum libidinis causa vel convitii castraverit? tenetur sive hoc volens fecerit, vel invitus, et sequitur poena aliquando capitalis, aliquando perpetuum exilium cum omni bonorum ademptione.* And agreeable thereunto, I finde a record in Bracton's time to this effect: *Henricus Hail et A. uxor ejus capti et detenti sunt in prisona de Evilchester, eò quòd reclati fuerunt quòd ipsi absciderunt virilia Johannis Monachi, quem idem Henricus deprehendit cum prædicta A. uxore ejus, &c.* Fleta saith, *Si quis castratus fuerit, talis pro mahemmiato poterit adjudicari.* And, therewith agreeth old justice Sennal in the Mirror; and so is the law holden at this day. And in the Appeale and Indictment of Mayhem it is said, *felonice mayhemavit*: whereof we shall speak more hereafter in his proper place. Cutting off of eares is no felony, as it appeareth by the statute of 37 H. 8. Vid. Stanf. Pl. cor. 27. a. The offender shall have the benefit of his clergie.

C A P. XIV.

OF BURGLARIE.

BURGLAR (or the person that committeth burglary) is by the ^a common law a felon, that in the night breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not. We call it in Latin *burglaria*: and in *statuto de officio coronat.* the offenders are called *raptores domorum.*

This word ^b *burglar*, is derived of these two words, viz. *burgh*, signifying an house, and *laron* signifying a thief, as it were an house-thiefe. ^c The Saxons called it *hurbpæc*, *inter scelera inexpiabilia.* And aptly was it derived from *latro*: for,

^d *Ut jugulent homines, surgunt de nocte latrones.*

^e Britton calleth him a *burgeffor*. Then let us peruse the branches of this description.

In the night.] ^f The word in the indictment or appeale, is, *noctanter, id est, noctu.* The natural day is divided in *lucem*, light, which is *dies solaris*, and in *tenebras*, which is night. ^g And therefore as long as the day-light continues, whereby a mans countenance may be discerned, it is called day: and when darknesse comes and day-light is past, so as by the light of day you cannot discern the countenance of a man, then it is called night. ^h *Posuisti tenebras, et facta est nox, in qua pertranscunt bestiae silvæ; sol oritur et congregatae sunt, exit homo ad opus et operationem suam, et redit vespere.* This doth aggravate the offence, sith the night is the time wherein man is to rest, and wherein beasts runne about seeking their prey.

In ancient records *crepusculum* was signified, when it was said *Inter canem et lupum*: for when the night begins, the dog sleeps, and the wolf seeks his prey. For so we finde the entry oftentimes in the raigne of E. 1. as taking one-example for many. ⁱ *Margeria filia Nicolai de Okele appellat Johannem Chose pro raptu, et pace regis fracta, die Martis, &c. inter canem et lupum, id est, inter diem et noctem, vel in crepusculo, Anglice twylight.*

^k *In placito de domo combusta malitiose hora vespertina, scilicet inter canem et lupum venerunt malefactores, A. B. &c.*

^l *Ignitegium, à tegendo ignem, i. coverle fue, hora octava post meridiem.*

^m Bracton saith, *Si quis furem nocturnum occiderit, ita demum impune foret, si parcere ei sine periculo suo non potuit; si autem potuit, aliter erit, in manibus enim regis sunt vita et mors hominum, sicut coram rege apud Windesore de quodam homine de Cocham, coram Gulielmo de Ralegh tunc justiciario, cui dominus rex in tali casu perdonavit mortem.* Agreeable hereunto was the law of the Twelve Tables, *Si noctu furtum factum sit, jure cæsus est.*

^a Inter leg. Edm. cap. 6. fo. 76. 22 Deut. 2.

^b Lib. 4. fo. 39. Brooke's case.

^c Inter leges. Canuti, fo. 118. cap. 61. Lamb.

^d Horace lib. 1. epist.

^e Britton, fo. 17.

^f 4 E. 6. Br. cor. 185. Stanf. pl. cor. fo. 30.

^g 3 E. 3. cor. 293.

^h Psal. 164. Lib. 7. fo. 6. b. Milborns case.

ⁱ Tr. 7 E. 1. coram rege, Rot. 12 Gloc.

^k Placita corone apud novum castrum, anno 24 E. 1. Rot. 6. in dorso.

^l Hil. 3. R. 2. coram rege Rot. 8. London. John Imperials case.

^m Bract. lib. 3. fo. 144. b. Pardon.

Break

* Mar. Dier 99.

Break and enter.] The words of the indictment be, *Fregit et intravit*: and this is understood of an actuall breaking of the house, and not of a breaking in law: for every entry into the house by a trespasser, is a breaking in law: but in case of a burglary, every entry is not a breaking of the house, for the words of the indictment be, *Felonicè et burglariter fregit, &c.* As if the doore of a mansion house stand open, and the thief enter into the house with a purpose to steale, this is a breaking of the house in law, and yet no burglary, because there must be an actuall breaking. So it is if the window of the house be open, and a thiefe with a hook or other engine draweth out some of the goods of the owner: this is no burglary, because there is no actuall breaking of the house. But if the thiefe breaketh the glasse of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actuall breaking of the house. It is deemed an entry, when the thiefe breaketh the house, and his body, or any part thereof, as his foot, or his arme, is within any part of the house: or, when he putteth a gun into a window which he hath broken, or into an hole of the house which he hath made, of intent to murder or kill; or as hath been said, a hook or other engine into any part of the house which he hath broken, of intent to steale: this being put by him into the house, is an entry and breaking of the house. But if he doth barely break the house without any such entry at all, that is no burglary, for it must be *fregit et intravit*.

Stanf. pl. cor.

30. a.

Dier 1 Mar. 99.

a. 22 Aff. p. 39.

95.

* 13 H. 4. 13.

* If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing neere to the doore, or about other parts of the house, or at a lanes end, or some orchard gate, or field gate, or the like, to watch that no help shall come to defend and aide the owner or dweller; this is burglary in all.

That which is done *in fraudem legis*, the law giveth no benefit thereof to the party. As if thieves come in the night with hue and cry, pretending that they be robbed, and shall require the constable to search for the felons, and whilest he goeth with them into some mans house, they binde and rob the constable, and dweller, this is burglary; for in judgement of law it is their act.

Into a mansion house.] The indictment saith, *Domus mansionalis*, a mansion or dwelling house.

* 2 E. 6. Br.

cor. 180.

Britton, fo. 17.

* *Domus mansionalis* is divided into two branches, viz. to inset edifices, as hall, parler, buttry, kitching, and lodging chambers, &c. and the outset buildings, as barnes, stables, cowhouses, dairies, &c. all these are parcels of the mansion-house, and will passe by the name of *domus mansionalis*. And albeit every mansion-house hath not all these buildings, yet every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed.

^b Lib. 4. fo. 40.
in Brocks case.
Hil. 38 Eliz. per
les justices, ibid.

^b If a man hath a mansion house, and upon some accident he and all his family some part of the night are out of the house, and in the mean time a thief break and enter into the house, of intent to steale; this is burglary, although neither the owner nor any of his family is in the house: for the indictment of burglary is, *domum mansionalem, &c. fregit, &c.* and this is *domus mansionalis*. ^c See hereafter the statutes of 23 H. 8. and 5 E. 6.

^c 23 H. 8. cap.
1. 5 E. 6. cap. 9.
See inter leges
Aluredi. c. 6.

If

^d If a man do break and enter a church in the night, of intent to steale, &c. this is burglary, for *ecclesia est domus mansionalis omnipotentis Dei.* * *Frustra legis auxilium invocat, qui in legem committit.* ^f *Domus mea domus orationis vocabitur, vos autem fecistis illam speluncam latronum. Sacrilegium derivatur à sacro et legere, id est, furari.*

A tent or booth in fair or market, is not *domus mansionalis*, but of another name or kind; & but that is provided for by the statute of 5 E. 6. cap. 9. whether the robbery be done in the night, or in the day, the owner, &c. being within the same, sleeping or waking. But a shop wherein any person doth converse being parcell of a mansion-house, or not parcell, is taken for a mansion-house.

Likewise a chamber or room, be it upper or lower, wherein any person doth inhabit or dwell, is *domus mansionalis*, in law.

Our ancient authors and old records did expresse burglary under this word, *hamfockne*, or *hamfokne*. The first is derived from two Saxon words, viz. of *ham*, that signifieth a mansion-house, *domus mansionalis*, which to this day we call our home: and *fockne* or *succen*, that is, *seeken*, as much to say, as to seek a man in his house to slay or rob him.

It is to be noted that our ancient authors, nor our old book-cases do distinguish between the day and the night, when the offence should be committed in the house, save only the Mirror.

Si quis hamfockne, quæ dicitur invasio domus contra pacem domini regis in domo sua se defenderit, et invasor occisus est, impersecutus et ultus remonebit, si ille quem invasit aliter se defendere non potuit: dicitur enim quod non est dignus habere pacem, qui non vult observare eam. And the Mirror saith, *Hamfockne de auncient ordinance est peche mortel, car droit est que chescun eyt quiet en son hostel, q. a la ley est.*

Others derive *hamfockne* from *ham*, which of both sides is confessed to be a mansion-house, and *fokne* which signifies a court, as much to say, as to have jurisdiction, or to hold plea of offences done to a man in his house.

One was indicted, *Quod clausum I. S. fregit, &c. ad ipsum interficiendum.* This is not felony without any act done, though it were *noctanter*: for the appeale and indictment of burglary is *quod domum mansionalem, &c. fregit et intravit.* So as neither close nor any other place, but the mansion-house only is required to make burglary. But burglary may be committed as well in the outset buildings, as in the inset, for all are parts of the mansion-house, and he that breaketh any of the outset buildings doth break *domum mansionalem*, as well as he that breaks the inset.

Of intent to kill.] If a man be indicted, that he in the night time did feloniously break the house of I. S. *ad verberandum ipsum I. S.* this is no burglary, because it was but to beat, and not to kill. But if it were *ad interficiendum I. S.* then it is burglary, though he never touched him; for the intent must be to commit felony, and not trespassse, or other thing that is not felony, the words of the appeale or indictment being, *Quod felonice et burglariter fregit, et intravit, &c.* so as there must be a felonious and burglarious intent.

Or to commit some other felony.] They be burglars which break any house or church in the night, although they take away nothing:

^d Britton, fo. 17.
Dier, 1 Mar. 99.
22 E. 3. tit. cor.
264.

22 Aff. p. 95.
26 Aff. 19.

^e 27 Aff. 42.
20 E. 2. Cor. 283.
12 E. 3. Cor. 120.
Rot. Claus.
3 E. 3. m. 2 &
18. the ordinary
may allow clergy
for sacrilege.
Lib. 11. fo. 29.

[65]

^f Matth. 21. 23.

5 E. 6. cap. 9.

Braeton, lib. 3.
fo. 144. b.
Britton, fo. 33.
Statut. Walliz,
fo. 6. ter. de
Snoden.
Mirr. cap. 1. §
11. de Ham-
fokne.
Exposit. vocab.
inter statuta.
Fleta, lib. 1. ca.
42.

13 H. 4. fol.
7. tit. cor. 229.

13 H. 4. ubi sup.

22 E. 3. cor. 264.
22 Aff. 39. &
95.

thing: otherwise it is of robbery, as shall be said hereafter. See Stanf. Pl. Cor. 30. b.

23 H. 8. cap. 1.
5 E. 6. ca. 9.

The statutes of 23 H. 8. cap. 1. and 5 E. 6. cap. 9. do not define what burglary is, but take away the benefit of clergy from certaine kindes of burglary. As when an actuall robbery is done, and when the owner or dweller, &c. is put in fear, &c. or when the owner or dweller, &c. is sleeping or waking within any place within the precinct of the same house; these circumstances do aggravate the burglary: and therefore the makers of those statutes took away the benefit of clergie not in all cases of burglary, but in those particular cases where a robbery is done, &c. But the statute of 18 Eliz. cap. 6. hath taken away the benefit of clergie in all cases of burglary: and hereby a good and equall proportion is kept in all cases of this nature. And both acts of parliament, and the resolution of judges do well agree together, which some not well observing have published manifest errours, which being in case of life are fit to be reformed.

Clergie.
18 Eliz. cap. 6.

39 Eliz. ca. 15.

If any man shall break a house by day, and take away thence money or goods to the value of five shillings or more, in any part of a dwelling house, or outhouse belonging to the same, though no person be therein, for this felony he shall lose the benefit of his clergy, so as for this offence the party shall suffer death, as in case of burglary.

[66]

C A P. XV.

Of BURNING of HOUSES.

De Incendiariis
inter leges Æ-
thelstani, cap. 6.
fo. 61.
Et Canuti, cap.
61. fo. 118.
Husbærnet nu-
meratur inter
scelera inexpla-
bilia.

^a Cap. Itineris.
^b Bract. l. 3.
146. b.

Brit. fo. 16.

Fleta li. 1. ca. 35.
De combustionibus.
Mirror ca. 1. § 8.
De Ardours
cap. 2. § 11. De
Appeal darson.
& § 12. cap. 3. §
Al arson.

HAVING now spoken of burglaries, and felonies concerning houses, there resteth one other of that kind, wherewith we will conclude this division, and that is, Burners of houses: which being a felony by the common law, let us see what our ancient authors, and old parliaments, and records have left unto us thereof.

^a The ancient article of the eire was, *De incendiariis nocturnis vel diurnis, et combustionibus tempore pacis nequiter perpetratis.*

^b Hereof Bracton saith, *Si quis turbata seditione incendium fecerit nequiter et in felonia, vel ob inimicitiam, vel alia de causa, capitali sententia punietur. Nequiter dico, quia incendia fortuita, vel per negligentiam facta, et non mala conscientia, non sic puniuntur, quia civiliter agitur contra tales.*

Britton saith, *Soit inquis de ceux que feloniouslyment en temps de peace aient auters blees, ou auters measons arses, et ceux que serr' de ces attaint, soient arses, issint que ils soient punies per mesme le chose dont ilz pecherent.*

Fleta saith, *Si quis ædes alienas nequiter ob inimicitiam, vel prædæ causa tempore pacis combusserit, et inde convictus fuerit per appellum, vel sine, capitali debet sententia puniri.*

The Mirror, *Ardours sont, que ardent citie, ville, maison home, maison beaſt, ou auters chateaux, de leur felonie en temps de pace pur hame*

*haine ou vengeance, &c. In Appeal de arson. Issint ieo dise, &c. Que Sebright illonque est defamy, &c. de ceo que a tiel jour, &c. en tiel meason, * ou biens, mist le feu, &c. And afterwards en respons al arson. Al arson poit il dire, que la venture avient de mischance, et nient de felony purpense.*

* Ou biens.
W. 1. ca. 15.

So hainous was this offence, that in anno 3 E. 1. it was declared by parliament, *Que ceux queux sont prises pur arson feloniously fait, ne soient en ascun manner replevisables. Adjudicantur suspendi, qui ex malitia præcogitata combusserunt magnam partem de Lynne in com. Norff.*

Hil. 7 E. 2. Co-
ra rége Rot. 24.
Norff.
8 H. 6. ca. 6.
See 15 H. 6.
nu. 23.

Upon dispersing of bills, threatening burning of houses, &c. was made high treason, whereof more hereafter: but that act is repealed by 1 E. 6. cap. 12. and 1 Mar. Now upon that which hath been said, our purpose is to frame a description of this felony, as may also be warranted by our year-books, and the common opinion and experience at this day.

Burning is a felony at the common law, committed by any that maliciously and voluntarily, in the night or day, burneth the house of another.

Now let us peruse this description, by all his material parts.

Burning.] Putting of fire into any part of a house, whereby that part burneth. For it is necessary, that there be a burning, but it is not necessary, that all or any part be wholly burnt, nor that the fire hath any continuance, but the intent only sufficeth not. As if one put fire into any part of a house, and it burneth not, this is no felony, for the words of the indictment be, *incendit, et combussit.* Again, if it doth burn, though it goeth out of it itself, it is felony.

All the ancient
authors.
3 H. 7. 10.
11 H. 7. 1.
23 H. 8. ca. 1.
25 H. 8. ca. 3.
5 & 6 E. 6. ca. 9.
4 & 5 Ph. &
Mar. cap. 4.
Lib. 11. fo. 35.
Alexander Poul-
ters case.
3 H. 7. ubi
supra.

By the common law.] This is proved by all the ancient authors, acts of parliament, and books aforesaid. And the reason thereof is, for that burning of houses being an hostile action, is presumed in law to be done maliciously for revenge, and as an enemy, to consume the same by fire in time of peace. It was made in special manner high treason, (as before is said) viz. if any threatned by casting of bils, to burn an house, if money be not laid in a certain place, and after did burn the house: but this treason is repealed by 1 E. 6. ca. 12. and 1 Mar. but yet the felony remaineth still: for *in proditione* (as hath been said) *implicatur felonia.*

[67]
8 H. 6. ca. 6.
3 H. 7. 10. per
Brian.
High treason.
Nota.

Maliciously and voluntarily. Proved also by the words of the indictment, which be, *voluntariè, ex malitia sua præcogitata, et felonice.* For if it be done by mischance, or negligence, it is no felony, as before it appeareth.

The law doth sometime imply, that the house was burnt maliciously and voluntarily. As if one intend to burn the house of A. only, and not the house of B. and yet in burning the house of A. the house of B. is burnt; in this case the burning of the house of B. is felony, because it proceeded of the malicious and voluntary burning of the house of A. and the event shall be coupled to the cause, which was voluntary, and malicious: and therefore in the indictment for the burning of the house of B. it shall be said, *voluntariè ex malitia sua præcogitata, et felonice, &c.*

Pl. Com. fo. 475.

The house of another.] This is not only intended of inset houses, parcell of the mansion-house, but to the outset also, as barn, stable,

Tr. 44 Eliz.
Coram rege. Ro.
20. 229. Lib.
Int. Coke, fo. 25.
b. lib. 4. fo. 20.
Barhams case.

* Pl. Com. 475.

cow-house, sheephouse, dairy house, millhouse, and the like, parcell of the mansion house: but burning of a barn, being no parcell of a mansion house, is no felony: and yet if there be corn or hay within it, the burning thereof is felony, though the barn be not part of a mansion house. * But the offender is not ousted of his clergy, but where he burns some part of a mansion house, or a barn with corn.

Note the ancient authors extended this felony, further then houses, viz. to stacks of corn, wayns or carts of cole, wood or other goods. And it is said in 3 H. 7. *ubi supra*, *Certum est quod crematio domorum felonice fuit feloniam per communem legem.*

3 & 4 E. 6. c. 5. The attempt to burn a stack of corn, was made felony by the statute of 3 and 4 E. 6. but this is repealed by 1 Mariae.

37 H. 8. ca. 6. Burning of the frame of a house, was made felony by the statute of 37 H. 8. because the frame of a house is no house: but that is repealed by 1 E. 6. ca. 12. and 1 Mariae.

43 El. ca. 13.

43 El. ca. 13. It is felony if any within the counties of Cumberland, Northumberland, Westmerland, or the B. of Duresme wilfully, and of malice burn or cause to be burnt any barn or stack of corn or grain, without benefit of clergy.

Bract. lib. 3. fo. 146. b.

Note a diversity between the indictment of burglary and burning; for the indictment of burglary must say (as hath been said) *domum mansionalem*, but so need not the indictment of burning, but *domum*, viz, a barn, &c. malt house, or the like.

[68]

C A P. XVI.

OF ROBBERY.

See the 1. part of
the Institutes.
Sect. 501.
Custum. de
Norm. cap. 71.

^a Int. leges Canu.
cap. 61. fo. 118.
Lamb.

^b Bracton, li. 3.
fo. 146.

Bracton, lib. 3.
fo. 150. b.

Britton, fo. 22.
Fleta, lib. 1.

ca. 37. Mirror
cap. 1. §. 10.

Britton & Fleta
Ubi supra.

14 E. 3. cor. 115.

ROBBERY is a felony by the common law, committed by a violent assault, upon the person of another, by putting him in fear, and taking from his person his money or other goods of any value whatsoever. ^a See *inter leges Canuti, apertae compilationes numerantur inter scelera hominum inexpiabilia.*

Robbery.] ^b It is derived *de la robe*, both because in ancient times (as sometime yet is done) they bereave the true man of some of his robes or garments, and also for that his money or other goods are taken from his person, that is, from or out of some part of his garment, or robe about his person. And is ranked in this place, for that it concerneth not only the goods, but the person of the owner. We call it, *roberia et rapina*, and the thief *raptor*. Whereof Bracton saith, *Est enim quasi furtum rapinae, quae idem est, quantum ad nos, quod roberia, et est genus contrectationis contra voluntatem domini, et similis poena sequitur utrunque delictum, unde praedo dicitur fur improbus: quis enim magis contrectat rem alienam invito domino, quam ille qui rapit?*

Felony by the common law.] This is agreed of, of all, both ancient and late, without any question. And it is deemed in law to be amongst the most hainous felonies, *crimen improbiissimum.*

Violent

Violent assault.] This agreeth with the indictment, *violenter et felonice cepit*, &c.

Bract. li. 3. fo.
150. b.

By putting him in fear.] This agreeth also with the indictment: and this circumstance maketh the difference between a robber and a cutpurse: both take it from the person, but this takes it *clam et secreta*, without assault or putting in fear, and the robber by violent assault, and putting in fear. If one cut a purse, with money in it above twelve pence, he shall be hanged, and the benefit of clergy is taken from him. But of ancient time the punishment was otherwise. *S. captus in London cum bursa quam scidit cum tribus solidis, et hoc non potuit deducere, et ideo amittat dextrum pollicem.* Britton saith, *Des cinsors des burses, voylons que celui que la bourse coupa, si auter marie se ne eyt fait, eyt judgement de pillory; et silz eyent emble auter chose meinder de 12 deniers, perdent un oraile, et si le chose passe 12 deniers, eyent judgment de mort.*

10 H. 3. cor:
434.
Britton, fo.
24. b.

By taking.] The words of the indictment be, *violenter et felonice cepit*. *Hic opus est interprete.* For it must be understood, that there is an actuall taking in deed, and a taking in law, and that may be, when a thief receiveth, &c. For example: if thieves rob a true man, and find but little about him, take it, this is an actuall taking; and by menace of death, compell him to swear upon a book to fetch them a greater sum, which he doth, and deliver it unto them, which they receive, this is a taking in law by them, and adjudged robbery: for fear made him to take the oath, and the oath, and fear continuing, made him bring the money, which amounteth to a taking in law, and in this case there need no speciall indictment, but the generall indictment (*quod violenter et felonice cepit*,) is sufficient. And so it is, if at the first, the true man for fear deliver his purse, &c. to the thief.

44 E. 3. 14.
4 H. 4. 2.

This word [*cepit*] necessarily implieth, that the thief must be in possession of the thing stoll: for example, if the bag or purse of the true man be fastned to his girdle, &c. and the thief the more easily to take the bag or purse, doe cut the girdle, whereby the bag or purse falleth to the ground, this is no taking, for the thief had never any possession thereof, *et sic de similibus*: but if the thief had taken up the bag, or purse, and in striving had let it fall, and never took it again, this had been a taking, because he had it in his possession; for the continuance of his possession is not required by law.

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From his person.] The words of the indictment be, *a persona*, &c. If the true man seeking to escape, for the safeguard of his mony, cast it into a bush, which the thief perceiving, takes it; this is a taking in law from the person, because it is done at one time. If the true man had cast off his surcote, or other uppermost garment, and the same lying in his presence, a thief assault him, &c. and take the surcote, this is robbery; for that which is taken in his presence, is in law taken from his person: and so it is of the horse of a true man, which stands by him, *et sic de similibus*.

14 E. 3. cor. 115.

In ancient authors and records, in pleas of the crown, you shall read of *sakebere*, &c. whom we will derive and explain. *Sakebere*, *sacbere*, or *sacburgh*, *sac*, or *sak* is an ancient French word, and signifieth a bag, purse, or powch. So that *sackbere* is he that did bear the bag, &c. and in legall understanding, is he that was robbed of his mony in his bag. And this agreeth with the interpretation there-

Bract. lib. 3. fo.
150. b.

Fleta, l. 1. c. 42.
Britton fo. 22. b. & 72 b.
Stanf. fo. 28.

14 E. 3. cor. 115.
22 Aff. p. 39.
27 Aff. 38.
24 E. 3. 42.
13 H. 4. 7.
9 E. 4. 28.

of by Bracton, viz. *Furtū verò manifestū est, ubi latro deprehensus est seiscitus de aliquo latrocinio, viz. hondhabende, and bacberende, et infecutus fuerit per aliquē cuius res illa fuerit, qui dicitur facaburth.* And herewith agreeth Fleta, lib. 1. c. 42. § *Sunt autem, &c.* And Britton, fo. 22. b. & 72. b. agreeth herewith, and calleth him *sakebere*; and so doth justice Stanford, Pl. Cor. fo. 28. term him, which (as we take it) is his right name derived of these two words, *fac*, and *bere*, that is, he that did bear the bag, &c.

Of what value soever.] Though it be under the value of twelve pence, that is taken; (as to the value of a penny or two pence) it is robbery, but somewhat must be taken, for the assault only to rob without taking some money or goods is no felony, and such opinions, as seem to the contrary were maintained by that, which then was anciently holden, *Quòd voluntas reputabatur pro facto.* See before, cap. High Treason, fo. 5. *insidiator viarum.*

C A P. XVII.

In what Cases Breakers of Prisons are Felons.

In the second
part of the In-
stitutes upon the
statute of 1 E. 2.
*De frangentibus
prisonam.*

WE have spoken sufficiently hereof in his proper place, in the exposition of the statute of 1 E. 2. *de frangentibus prisonam.* Only this is to be added, that in case of felony, the offender shall have the benefit of clergy, for the breach of prison.

[70]

C A P. XVIII.

Where Escape Voluntary is Felony.

WE have also spoken somewhat hereof in the exposition of the said act of 1 E. 2. And the voluntary escape can be no felony in the gaoler, unlesse the prisoner be under custody by lawfull warrant expressing the offence, which you may see there at large.

2. There must be a felony done at the time of the escape: for a relation which is but a fiction in law, shall never make a man a felon, as likewise there it appeareth. See Stanford, lib. 1. cap. 26, &c.

C A P.

C A P. XIX.

Of Felonie by stealing, carrying away, withdrawing or avoiding of Records, &c.

S*I ascun record (1) ou parcel dicel, breif, retorne, pannell, proces, ou garrant d'attorney (2) en les courts le roy (3) de chancery (4) eschequer, lun banke, ou lauter, ou sa tresorie (5) soit voluntairement emblee, emport, retreit, ou avoide (6) per ascun clerke ou auter person (7), a cause de quel ascun iudgement (8) soit reverse (9): que tiel embleor, emporter, retraher, et avoider, leur procurators, counsellors, et abettors (10) ent endites (11) et sur proces sur ceo fait, ont duement convicts per leur proper confession, ou per enquests prender des loiall homes, (dont la moitye soit des homes dascun court (12) de mesme les courts, et lauter moitye des auters) soient adjudges pur felons, et encorgent la paine de felony, et que les iudges de les courts de lun banke, ou de lauter eyent power de oier et terminer, tielz defaults devant eux, et ent fait punition, come devant est dit (13).* 8 H. 6. cap. 12.

IF any record or parcell of the same, writ, retorne, panell, processe or warrant of attorney in the kings courts of chancery, exchequer, the one bench or the other, or in his treasury be willingly stolne, taken away, withdrawne, or avoided by any clerk, or by other person, because whereof any judgement shall be reversed: that such stealer, taker away, withdrawer, or avoyder, their procurators, counsellors, and abettors, thereof indicted, and by proces thereupon made thereof duly convict, by their own confession, or by inquest to be taken of lawfull men, (whereof the one halfe shall be of the men of any court of the same courts, and the other halfe of others) shall be judged for felons, and shall incurre the paine of felony. And that the judges of the said courts, of the one bench or of the other, have power to hear and determine such defaults before them, and thereof to make due punishment, as afore is said.

[71]

The mischief before this statute was, That whereas records are of such high nature and credit, as they import in themselves absolute verity without contradiction; to the end, that there might be an end of contention and controversie, and men might rest in safety and repose, certaine clerks and other persons did oftentimes imbesell records, or some parcell of them, and sometime a

writ, retorne, panell, proces, or warrant of attorney; or rafe or vitiate the same; by reason whereof divers judgements were avoided, or reversed, whereby no man (as the statute saith) had any thing in surety. This was a great misprision, for the which the offenders therein might be punished, either at the suit of the king by indictment, or at the suit of the party by an action upon his case. See the record concerning this matter following. *Placita coram justiciariis de banco termino Trinitatis anno 19 E. 1. Rot. 57. indors.*

Radulphus de Greshope communis attornatus de com. Westmerland malitiose rotulum excutavit et abscidit, et ideo per annum et diem committitur turri London, postea anno 20 E. 3. per mandatum regis liberatur et per justiciarios ei est inhibitum ne de cætero in eadē curia de aliquibus negotiis se intromittat.

Which remedie and punishment were thought too weak against clerks and other persons, which (committing such things) commonly were of small ability: therefore this act, considering the danger of the offence, maketh the same felony, as by the letter thereof appeareth.

(1) *Si ascun * record.*] A record is regularly a monument or act judiciall before a judge, or judges, in a court of record, entred in a parchment in the right roll. It is called a record, for that it recordeth or beareth witnesse of the truth, and is derived of the verb *recorder*, whereof the poet speaketh,

Si rite audita recorder.

It hath this soveraigne priviledge, that it is proved by no other but by it selfe. *Monumenta (quæ nos recorda vocamus) sunt vetustatis et veritatis vestigia.* And albeit the cause adjudged be particular, yet when it is entred of record, it is of great authority in law, and serves for perpetuall evidence, and therefore ought to be common to all, yea, though it be against the king: as it is declared by act of parliament in anno 46 E. 3. which you may reade in the preface to the third book of my reports.

(2) *Breife, retorne, panel, proces, ou garr' d'attornie.*] All these are sufficiently known, and yet have we treated of the same in the first part of the Institutes.

(3) *En les courts le roy.*] Here are expressly named four of the kings courts, viz. the chancery, the exchequer, the kings bench, and the court of common pleas, and hereunto is added the kings treasury: so as this act extendeth not to any other court or place, then is here named.

(4) *Chancery.*] This must be understood of the court of chancery, which proceedeth according to the course of the common law, as in case of priviledge, of *scire facias* upon recognizances, traverses of offices, and the like: for as to these it is a court of record, but as to the proceeding by English bill in course of equity, it is no court of record, for thereupon no writ of error lieth, as in the other cases.

(5) *Ou sa tresorie.*] The kings treasury is called *thesauraria regis*, the place where the kings treasure is kept. This treasure is twofold, viz. his money or coine: and another, that is far more precious and excellent, and those be the sacred judgements, records, and other judiciall proceedings under the safe custody of the treasurer,

* See the first part of the Institutes sect. 117. for this word.

^a 9 E. 4. 3. b. 16 Eliz. Dier, 330. a. Virgil.

Rot. Parl. 46 E. 3. 9 H. 7. 16. See the preface to the third book.

37 H. 6. 14.

treasurer, and chamberlains of the exchequer. And this treasury is partly in the exchequer, and partly in the towre of London: for there be ancient rolls of the treasury remaining in the towre. And therefore this act intending to include both the one, and the other, saith generally, *en sa tresorie*. Register.
F. N. B. 244. d.

(6) *Soit voluntairement emblee, emport, retreit, ou avoide.*] In the indictment upon this statute besides *felonice*, this word [*voluntarie*] must of necessity be used, to agree with this act. Here be four words used, *emlee* stolne, *emport* carried away, *retreit* withdrawne, *ou avoide* or avoided. So as the sense is, if any record or part of it, writ, retorne, panell, proces, or warrant of attorney, &c. be stolne, carried away, withdrawn, or avoided, &c. And this word [avoided] is a large word, and doth include, rasing, or clipping, or cutting off of the side, or other part of the roll, or any other kind of avoiding the same. 2 R. 3. 10.

(7) *Per ascun clerk ou auter person.*] This act doth not extend to any judge of the court; both because it beginneth with a clerk, &c. and for that by the statute of 8 R. 2. a penalty is inflicted upon a judge, &c. for making any false entry, rasing any roll, or changing any verdict. See the statute; for it extendeth also to clerks. Only this is to be observed in that statute, that where it is said [the king and his counsell,] it is intended of the court of justice where the matter dependeth: for the judges are the kings counsell for judicature and proceedings according to law and justice. 2 R. 3. 10.
8 R. 2. cap. 4.

Justice Ingham paid in the raigne of E. 1. eight hundred marks for a fine, for that a poore man being fined in an action of debt at thirteen shillings foure pence, the said justice moved with pity caused the roll to be rased, and made it six shillings eight pence. 2 R. 3. 10.

This case justice Southcot remembred, when Catlyn chiefe justice of the kings bench in the raigne of queen Elizabeth, would have ordered a rasure of a roll in the like case, which Southcot, one of the judges of that court, utterly denied to assent unto. and said openly, that he meant not to build a clock-house: for (said he) with the fine that Ingham paid for the like matter, the clock-house at Westminster was builded, and furnished with a clock, which continueth to this day.

(8) *A cause de quel ascun judgement soit revers.*] This act extendeth only to records, whereupon judgement is given. But whether judgement be given in causes criminall at the suit of the king upon an indictment, or at the suit of the party in an appeale, or in actions, reall, personall, or mixt, or of the like nature, this act extends thereunto, if judgement be afterwards given, and to outlawries, for there judgement is given *per judicium coronatorum*. For it is not materiall whether the act be done against this statute, either before or after judgement, so judgement be given. 2 R. 3. 10.

(9) *Revers*] is here taken, not only where the judgement is made erroneous, and to be reversed by writ of error, but where the judgement is so annihilated, and made voide, as it bindeth not, or may be reversed or avoided by plea. See the book in 2 R. 3. fol. 10. which expoundeth well this statute.

(10) *Que tiel embleor, emporter, &c. leur procurers, counsellors et abettors, &c.*] This act expressly extendeth to accessories before, and leaveth accessories after to the construction of law, yet may there

Vide 3 & 4 Ph.
and Mar.
Justice Dalisons
Report, ubi sup.

Stanf. pl. cor.
44. b.
3 H. 7. cap. 2.
2 R. 3. fo. 10.

there be accessories after the fact: for whensoever an offence is made a felony by act of parliament, there shall be accessories to it both before and after, as if it had been a felony by the common law, and therefore though this act expresseth accessories * before, yet it taketh not away accessories after, but leaveth them to the law, contrary to the opinion of justice Stanford. See before the exposition of 3 H. 7. for taking away of women against their will.

(11) *Ent endites.*] If the acts that make this felony, be committed in two counties, the indictment faileth, as hath bin said before upon the statute of 2 & 3 E. 6. cap. 24. And this case of felony rising in two counties, is not holden by any statute yet made.

(12) *Dont la mo'ity soit des hommes dascun court.*] Here is a party jurie, the one halfe to be of the officers and clerks of the court, &c. for their knowledge, and for the better information of the others.

(13) *Et que les judges des dits courts de lun bank ou de lautre eyent power de oier et terminer tiels defaults devant eux, et ent faire punition, come est avant dit.*] This clause is in nature of a commission to the justices of either bench, if the offence be committed in the county where the benches do sit. And the justices of either bench have a concurrent authority, and which of them enquire first shall proceed: but if the felony be committed in another county, then where the benches sit (as for example in Surry, Hertfordshire, &c.) there the justices ought to have a commission. But if the bench sit in Middlesex, and the felony is done in London, in which case a commission is requisite, as is aforesaid. But then some have said, that by the charters of London confirmed by parliament, the major ought to be principall in the commission, and the major is none of the judges authorized by this act to heare and determine this felony, but the justices of the one bench or the other; and therefore the statute being penall, and to be taken strictly, no proceeding can be. *Sed salva res est:* for the charters of the city of London extend only to such offences committed in London, whereof the major with others by commission may enquire of, heare, and determine, and not to such offences so annexed by authority of parliament to other persons (as in this case to the justices of the one bench or the other) as the major is not warranted by the said act to enquire, &c. And therefore a commission in this case may be made to the justices of the one bench or the other, omitting the major, *ne curia regis deficeret in justitia exhibenda.*

2 R. 3. 10.
2 R. 3. 11.

4 H. 7. cap. 13.
22 H. 7. cap. ult.

7 H. 7. cap. 1.

And albeit this kinde of felony is an heinous offence, yet may the offenders therein have their clergy: for untill the raigin of H. 7. (that we may note it once for all) the benefit of clergy was not taken away by any act of parliament in case of felony. As for the statute of *bigamis* made in 4 E. 1. it was but an exposition and allowance of the constitution made at the generall councell at Lyons concerning the same, as before hath been said. But (as we remember) the first statute making a new felony that took away the benefit of clergy was the statute of 7 H. 7. concerning soldiers. *Vide lib. 8. fol. 160. & lib. 11. fol. 11.*

C A P. XX.

Of Felony in such as use the Craft of Multiplication.

NONE from henceforth shall use to multiply gold or silver, or use the craft of multiplication (1); and if any the same doe, he shall incur the pain of felony, 5 H. 4. ca. 4.

This is the shortest act of parliament that we remember; before the making whereof, divers of the nobility, gentry, and others did waſt and conſume a great part of their inheritance, and wealth, about the art of multiplication, by the ſubtile and ſiniſter perſwaſion of certain impoſtors, and deceivers, which took upon them to be ſkilfull therein, and to be able to multiply gold and ſilver, being themſelves for the moſt part very poor and indigent perſons, of whom it was ſaid, *Quod pollicentur aliis ingentes divitias, et ipſi petunt parvas drachmas.* See Chaucer our Engliſh poet, who wrote about the time of the making of this act, in the tale of the Chanons Yeoman, fo. 63. (*in libro meo,*) that the end of this ſliding and curſed craft (ſo full of impoſture and deceit) is extream beggery: he is worth the reading, for he diſcovereth the ſecrets of this craft, as our act tearms it.

Now ſeeing the end of this feigned art of multiplication is meer deceit, and tendeth to the undoing of many; at this parliament the uſe of this craft of multiplication is made felony. For the better underſtanding of that which ſhall be ſaid, it is to be known, that there are ſix kinds of metalls, viz. *aurum, argentum, æs, ſive cuprum (quia inventum fuit in Cypro) ſtannum, plumbum, et ferrum.* That is to ſay, gold, ſilver, copper, tynne, lead, and iron; for *chalybs* ſteel is but the harder part of iron, and *orichalcum, aurichalcum*, viz. lattyn or braſſe, is compounded of copper and other things.

(1) *The craft of multiplication.*] That is, to change other metalls into very gold or ſilver. And this they pretend to doe by a *quint eſſence*, or a fifth eſſence. Four eſſences, or elements we know, fire, aire, water, and earth, but ſay they, this *quint eſſence* is a certain ſubtill, and ſpirituall ſubſtance extracted out of things by ſeparation from the four elements, differing really from their eſſence, as *aqua vitæ*, the ſpirit of wine, or the like, and this is called *elixar*, or the philoſophers ſtone, and it is part of alchemie, or chemie, in Latine *ars chemica*. The offenders therein are called multipliers, chemiſts, alchemiſts, &c. There * may be acceſſories to this new felony, both before and after. King Henry the fixth, by his letters patents, *de concilii ſui deliberatione deputavit Willm. Cautelo et alios cives civitatis London ad inveſtigandam veritatem ſuper hiis quæ in ſcriptis erunt eis monſtrata, pro multiplicatione* *nunismatis,*

* 7 E. 6. Dier,
88 Rot. Pat. 34
H. 6. m. 13.

^a Ro. Pat. 35
H. 6.

^b Ro. Pat. 34
H. 6. m. 7.

Hanc artem sophisticam imposturam nominat
Melancthon.

Mentiendi et fallendi artem.

Petrarch. Eras.
in Colloquio

Dæmonis præstigias. Peucerus

Cbaucer ubi

supra. The cursed

and sliding

craft. *Vertitur*

in fumum quicquid ineptus agit.

See *Pancirollus.*

Int. nova reperta

tit. 7. fo. 357.

Vide Stanf. pl.

cor. 37. b.

Gen. c. 1. v. 9.

cap. 2. v. 11.

* [75]

nunismatis, tam de auro, quam argento, et quicquid in præmissis egerint, cum eorum opinione referrent in scriptis regi et concilio suo.

The like ^a letters patents anno 35 H. 6. *pro Thoma Harvie et aliis.*

Rex^b ex sua regali prærogativa, &c. dedit licentiam Johanni Faceby et aliis ad investigandum, prosequendum et perficiendum quandam preciosissimam medicinam, quintam essentiam, lapidem philosophorum nuncupatum, nec non potestatem faciendi et exercendi transmutationes metallorum in verum aurum, et argentum, with a non obstante of this statute of 5 H. 4. By these letters patents this act is more explained, then by any record we have seen.

How these several kinds of metalls, as is supposed, proceed originally from sulphur * and quicksilver, as from their father and mother, and other things concerning the same, you may at your leisure read in George Agricola, lib. 10. ca. 1. Encelms, li. 1. ca. 1. Pl. Com. 339.

Almighty God in the fourth day created the earth, and no mention is made of metals, for that they were as parts of the earth.

The fatall end of these five are beggery; this kind of alchemist, the monopolist, the concealer, the informer, and poetasters.

Sæpe pater dixit, studium quid inutile tentas?

Mæonides nullas ipse reliquit opes.

I could give examples (of mine own observation) of all these, if it were pertinent to our purpose.

C A P. XXI.

Of Felony in Hunters in the Night, or with painted Faces, in any Forest, Park, or Warren.

1 H. 7. ca. 1.

AT every such time as information shall be made of any unlawfull huntings in any forest, park, or warren (3) by night, or with painted faces (1) to any of the kings counsell (4) or any the justices of the kings peace (5) in the county where any such hunting shall be had, of any person to be suspected (2) thereof, it shall be lawfull to any of the same counsell, or justices of peace, to whom any such information shall be made, to make a warrant (6) to the sherif of such county, or to any constable, bailif, or other officer within the same county, to take and arrest the same person and persons of whom such informations shall be made, and to have him, or them before the maker of the same warrant, or any other (7) of the kings said counsell, or his justices of peace of the same county. And that the said counsellor or justice of peace, before whom such person, or persons shall be brought, by his discretion have power to examine him or them so brought, of the

the said hunting, and of the said doers in that behalf (8): and if the same person * wilfully conceal the same huntings, or any person with him defective therein (9), that then the same concealment be against every such person so concealing felony, and the same felony to be enquired of and determined, as other felonies within this realm have used to be: and if he then confesse the truth, and all that he shall be examined of, and knoweth in that behalf (10), that then the said offences of huntings by him done, be against the king our soveraigne lord, but trespassse finable, by reason of the same confession, at the next generall sessions of the peace to be holden in the same county, by the kings justices of the same sessions, there to be fessed. And if any rescous, or disobedience be made to any person having authority to doe execution, or justice by any such warrant, by any person, the which so should be arrested, so that the execution of the same warrant thereby be not had, that then the same rescous and disobeylance be felony (11), inquirable and determinable, as is aforesaid. And over this, it is enacted and stablished, that if any person or persons hereafter be convict of any such huntings with painted faces, visors, or otherwise disguised, to the intent they should not be known, or of unlawfull hunting in time of night, that then the same person or persons so convict, to have like punishment, as he or they should have, if he or they were convict of felony (12).

* See the exposition of this word [conceal] hereafter in this chap.

[76]

Now let us peruse the words of this new and ill penned law.

(1) *By night, or with painted faces.*] That is to say, either by night, or in the day with painted faces, for that doth equall the case of the night, in respect the offenders cannot be known, or discerned, in regard of such disguisings. And albeit the body of the act speaketh only of painted faces, yet it extendeth to visors and other disguisings, for those words are in the preamble rehearsing the mischief, and the remedy must be appliable thereunto, and the last branch of this act doth make this point clear.

(2) *As information shall be made, &c. of any person to be suspect.*] Hereby it appeareth, that a bare information without shewing just cause of suspicion at the least, is not sufficient to ground a warrant according to this act, for the words be, [of any person to be suspected.] And this act is generall, and extends to all persons of what estate or degree soever, and as well to women, as to men: for the words be [if any person] and *generalia verba sunt generaliter intelligenda*. And it is necessary for him that taketh the information, to take it in writing, because it is the ground of his warrant.

(3) *Of any unlawfull huntings in any forest, park, or warren.*] This act doth not extend to any chase of the king, or of any other person, neither doth it extend to any forests, parks, or warrens in use or reputation, and which are not forests, parks, or warrens in law. See the 1. part of the Institutes, sect. 378. what a forest, a chase, and a park, &c. is.

21 E. 1. tit. Forests. Rast. 19.

(4) *To any of the kings counsell.*] This is understood of the kings privy counsell; and any one will serve, but he must be dwelling in the county where such offence is committed.

(5) Or

(5) *Or to any the justices of the kings peace, &c.]* And likewise any one justice of the peace will serve.

(6) *Warrant.]* This warrant ought to be in writing under the seal of him that maketh it.

(7) *Before the maker of the same warrant, or any other, &c.]* So as the officer may carry the party arrested before any privy counsellor, or justice of peace within that county, and to that effect must the warrant be made.

(8) *By his discretion have power to examine him or them so brought of the said hunting, and of the doers in that behalf.]* So as the examination must consist upon two parts. First, of the hunting by the party himself. Secondly, of other doers in that behalf.

(9) *And if the said person wilfully conceal the said hunting, or any person with him defective therein.]* This branch being in the disjunctive, if he conceal either his own offence, or of the other misdoers with him therein, the letter of this act is that it is felony, but by construction * upon the whole statute, it is no felony: and a hunting without killing of any game, is within the danger of this statute.

This act is to be taken strictly; for it is the first law that was made for the making of any hunting felony, against that excellent and equall branch of *carta de foresta*. *Nullus de cætero vitam vel membra pro venatione nostra, &c.* See the statutes of 21 E. 1. 1 E. 3. stat. 1. cap. 8. 7 R. 2. ca. 4. Westm. ca. 8. Regist. fol. 9. F. N. B. fo. 67. Vet. N. B. 41. 45 E. 3. 7. 33 H. 8. Dier. 50.

The old statutes concerning the forests are called the good old laws, and customes, and commanded to be observed; and therefore this new act of H. 7. is too severe for beasts that be *feræ natura*, whereof there can be no felony by the common law, and that in case of the forests, parks, &c. of subjects, which never was before: and therefore the judges have made a favourable construction, as hereafter in this chapter you shall find.

(10) *And if he confess the truth, and all that he shall be examined of, and knoweth in that behalf.]* That is of his own guiltinesse, and of other misdoers with him, then this act makes it no felony, but trespassse finable, as it was before: but it must be a wilfull concealment; therefore if he knew not the names of the other misdoers, or knew not whether they were there or no, it is no offence, for the concealment must be wilfull. And seeing there is no time limited by this act, and the concealment ought to be wilfull, it were reason, that the information should be made in convenient time after the fact done.

(11) *And if any rescous or disobedience be made to any person having authority to do execution of justice by any such warrant by any person, the which so should be arrested, so that execution of the same warrant be not had, that then the same rescous and disobedience be felony.]* Here it is to be observed that the hunting being as yet no felony, the rescous could not be felony, if this branch had not been. Herein two things are to be considered; first, that it extendeth not but to the rescous, or disobedience, that is committed by the party himself, that is to be arrested, and not to any other. Secondly, that if the party rescue himself, yet if he be pursued and taken, so as execution of the warrant be had, it is no felony, as it is manifest by the letter of this branch.

(12) *And*

D. Haward tempore H. 1. fo. 24. Vide Holl. 10 R. 1. 153. Vide Camden Brit. 210.

*[77]

Cart. de Forest. cap. 10.

Rot. Parl. 9 H. 4. nu. 40.

(12) *And over this be it enacted, &c. That if any person or persons hereafter to be convict of any such huntings with painted faces, visors, or otherwise disguised, &c. or of unlawfull hunting in the night, * that then the same person or persons so convict, to have like punishment, as he or they should have, as if they were convict of felony.*]

* Nota [that the] &c. So as before such conviction there is no felony.

Gerrard the queens attorney general (who was a grave and reverend man) said openly in the kings bench, that it had been resolved by the justices upon this statute, that if a man in the night, or by day with painted face doe hunt, &c. and being examined according to the act and concealeth it, this is (upon the construction of the whole act) no felony; for the first clause concerning concealment, and this clause which now we handle, must be coupled or joyned by construction together, viz. if any person be convict of such hunting with painted face, or of unlawfull hunting in the night, this conviction must be upon not guilty pleaded, which the justices expounded to be the * concealment intended in the first branch, for they held that it ought to be a judiciall concealment, and not an extrajudiciall concealment, before one of the privy counsell, or a justice of peace which may lie in averment, so as before it be felony, he must be convicted of such hunting, &c. upon not guilty pleaded first: and after such conviction then must he be indicted again, *super tota materia*, that he *felonicè* did conceal, &c. against the form of the statute: and if the offender upon the first indictment confesseth the indictment, then it is such a judiciall confession as this act intendeth, and no felony within this statute. And this we heard the attorney report, and then observed it, which concurring with our own opinion we thought good to publish, and the rather for that in master Lambards book of Justice of Peace amongst his precedents of indictments an erroneous precedent of an indictment is of felony for the concealment, &c. upon examination before justices of peace.

Mic. 19 & 20 El. In the kings bench a report of the resolution of the justices upon this branch.

* Concealment expounded.

[78]

It is said in 33 H. 8. that chafing in parks is made felony, (intending this statute) notwithstanding it may be made trespassse at the pleasure of the party, which we think is the clearest way.

Dier, 33 H. 8. fol. 50. a.

Now what time shall be adjudged night, see before in the chapter of Burglary. For this felony the delinquent may have his clergy: see Stanford, 37. b.

C A P. XXII.

Of Felony for imbesiling the Kings Armour, Ordnance, &c. or Victuall, to the Value of Twenty Shillings, provided for Souldiers.

31 El. cap. 4.

* Nota for victualls.

[79]

BE it enacted by the authority of this present parliament, that if any person, or persons, having at any time hereafter the charge or custody of any armour, ordnance (1), munition, shot, powder or habillements of war (2) of the queens majesties, her heirs, or successors, or of any victualls provided for the victualling of any souldiers, gunners, mariners, or pioners, shall for any lucre, or gain, or wittingly, advisedly, and of purpose to hinder or impeach her majesties service, imbesill, purloin, or convey away any the same armour, ordnance, munition, shot, or powder, habillements of war, or * victualls, to the value of twenty shillings, at one or severall times: that then every such offence shall be judged felony, and the offender and offenders therein to be tried, proceeded on, and suffer as in case of felony. Provided always, and be it enacted by the authority aforesaid, that none shall be impeached for any offence against this statute, unlesse the same impeachment be prosecuted or begun within the year next after the offence done. And that this act, nor any thing therein contained, nor any attainer nor attainders of any person or persons for any offence made felony by this act, shall in any wise extend, or be adjudged, interpreted, or expounded to make the offender or offenders to forfeit, or lose any lands, tenements, or hereditaments any longer, then during his or their life or lives, or to make any corruption of blood to any the heir or heirs, of any such offender or offenders, or to make the wife of any such offender to lose or forfeit her dower, or title of dower of or in any lands tenements, or hereditaments, or her action or interest to the same: any thing in this act contained, or any attainer or attainders hereafter to be had for any offence made felony by this act to the contrary notwithstanding. And that such person and persons, as shall be impeached for any offence made felony by this statute, shall by vertue of this act be received, and admitted to make any lawfull prooffe that he can, by lawfull witnesse or otherwise, for his discharge and defence in that behalfe, any law to the contrary notwithstanding.

This is a necessary law, and so penned, as it requireth no curious exposition.

(1) *Ordnance.*] That is guns or artillerie so called, of an order, or

or ordinance anciently made, of what bore, size, or bulk the same should be. And albeit the ordinance (that we can finde) is not extant, yet the name remaineth.

(2) *Habillements of warre.*] *Habillement* is properly apparell or clothing: but in legall understanding it doth not only extend to harnesse and armour, but to all utensils that belong to war, without which men have not ability to maintain war.

This act making a new felony, hath five excellent provisions, worthy to be imitated in all like cases of new felonies. First, that none shall be impeached for this new felony, but within a year after the offence done. Secondly, that the offender should not lose his lands any longer than during his life. Thirdly, this act makes not any corruption of blood, but that his heire shall inherit. Fourthly, not to make the wife lose her dower. Fifthly, that such persons as shall be impeached for any offence made felony by this act, shall be admitted to make any lawfull prooffe ^a by witnesse, or otherwise for his discharge and defence in that behalfe.

In the statute of 4 *Jacobi regis*, there is also a good president, viz. [All which trials (viz. in cases of felony in that act before mentioned) ^b first for the better discovery of the truth, and secondly, for the better information of the consciences of the jurie and justices, there shall be allowed to the party so arraigned the benefit of such witnesses only to be examined upon oath, that can be produced, for his better clearing and justification]: that as witnesses are produced and sworne against him, so he may have witnesses produced and sworne for him, for *jurato creditur in judicio*. And to say the truth, we never read in any act of parliament, ancient author, book case, or record, that in criminall cases the party accused should not have witnesses sworne for him; and therefore there is not so much as *scintilla juris* against it. And I well remember when the lord treasurer Burleigh told queen Elizabeth, Madame, here is your attorney generall (I being sent for) *qui pro domina regina sequitur*, she said she would have the forme of the records altered; for it should be *attornatus generalis qui pro domina veritate sequitur*. And when the fault is denied, truth cannot appear without witnesses.

Hobelarius (*id est*, a light-horseman) *electus in Scotiam recepit armaturas et denarios, ibidem serviturus, postea non proficiscitur per mandatum regis, et recusavit reddere armaturas, et denarios, &c. per juratores est culp. et committitur mareschallo, et finivit regi 10 li. et invenit securitatem ad armaturas redeliberandas, &c.*

Bonum est scire et sequi.

Vid. hereafter, cap. of felony for any having a plague sore a more speciall provision.

^a Nota.

4 Jac. regis cap. 1.

^b Nota, two excellent means for advancement of justice.

Hil. 16 E. 3. coram rege.

Rot. 129. Norff.

C A P. XXIII.

Of Felonie in such as passe the Sea to serve Forain Princes, &c. or do serve Forain Princes, &c. without taking the Oath of Obedience.

3 Jac. cap. 4.

EVERY subject of this realm (1) that shall goe or passe out of this realm to serve (2) any foraign prince (3), state (4), or potentate (5), or shall passe over the seas, and there shall voluntarily serve (6) any such foraine prince, state, or potentate, not having before his or their going or passing, as aforesaid, taken the oath of obedience (7) (prescribed by that act) before the customer and controller of the port, haven, or creek, or one of them, or their or either of their deputy or deputies, shall be a felon.

See 33 H. 8. ca.
7. Simile.

Some have objected, that the going or passing out of this realm, to serve, &c. cannot be tried; for that offences done out of the realme, cannot without a speciall provision be tried within the realme. And it is a sure rule, that in criminall causes concerning life or member, *ubi deliquit, ibi punietur*: the offence is locall, and cannot be tried, but where it is committed, nor cannot be alleaged to be in any other place then where in truth it was done. To this it is answered, that by a latter clause in this act, this felony shall be tried in the town wherein the haven or port is, wherein he went or passed over; which clause is, And be it further enacted, that all and every offence to be committed or done against this present act, shall and may be inquired of, heard, and determined before the justices of the kings bench, justices of assize and gaole-delivery in their severall assises; and all offences, other than treason, shall be inquired of, heard, and determined before the justices of peace in their quarter sessions, to be holden within the shire, division, limit, or liberty, where such offence shall happen. So as by the purvien and meaning of the makers of this act, this felony must be tried in the county where he went or passed over, and consequently in that town where part of the act was done. And these words [and wherein such offence shall be committed] must be construed in this case, where part of the offence is committed. For *sic interpretandum est, ut verba accipiantur cum effectu*: and by the expresse words, all and every offence to be committed or done against this present act must be inquired of, heard, and determined, &c. And therefore the felony cannot passe away with impunity, and that which is done out of the realme shall be proved to the jury in evidence. Note where a forain treason by this act is made, it is enacted to be tryed where the offender is taken.

(1) Every

(1) *Every subject of this realme.*] This branch extends to all persons of what estate, degree, or profession soever.

(2) *To serve.*] Albeit the party did not serve, yet if the offender went or passed over to serve without taking the oath, he is in danger of this statute. And this extendeth to any kind of service, either in campe or army, or in house or otherwise.

(3) *Any foraine prince.*] [*Princeps*] Prince is here taken for the person that is *primus*, i. e. *Qui primum locum, et gradum obtinet*, whether he be king, or any other that hath soveraigne authority, by what name or title soever. The word hath other significations, but not pertinent to the exposition of this act. Prince.
[81]

(4) *State.*] The former word [prince] includeth any, that is a monarch, or in nature of a monarch, or an absolute prince. This word [state] extends to any state, either aristocraticall, where few be in authority, or democraticall, where the people have the chiefe government without any superiour, saving such as they elect and choose. State.

(5) *Potentate.*] This is a large word, and extendeth to potentates, as well ecclesiasticall as temporall. Potentate.

(6) *Or shall passe, &c. and there shall voluntarily serve.*] Although he went not over of purpose to serve, but upon some other occasion: yet if he after voluntarily serve any such foraine prince, state, or potentate, and have not taken the oath, he is a felon.

(7) *The oath of obedience.*] This is particularly set downe in the said act.

And that if any * gentleman or person of higher degree, or any person or persons, which have borne, or shall beare any office or place of captaine, lieutenant, or any other place, charge, or office in campe, army, or company of souldiers, or conductor of souldiers, shall after goe or passe voluntarily out of this realme to serve any such foraine prince, state, or potentate, or shall voluntarily serve any such prince, state, or potentate, before he and they shall become bound by obligation with two such sureties, as shall be allowed by the officers, &c. shall be a felon.

* Vid. hereafter cap. 34. in fine. Second part of the Institutes. The statute of additions. 1 H. 5. cap. 5.

By this branch, if he be a gentleman, or of higher degree, or any such military man, as here is described; because he is able to do more harme, if he be so disposed, he must not only take the oath by the former branch, but he must become bound by this branch with two sureties, &c. The forme of the obligation is set downe in this act. The exposition of the former branch giveth light to the understanding of the residue of this clause.

There is a proviso, that no attainder of felony, made felony by this act, shall take away dower, nor make, or work, any corruption of blood, or disherison to the heire. The offenders in any of the said cases of felony may have the benefit of their clergie.

C A P. XXIV.

Of Felonie in Purveyors.

See in the fourth part of the Institutes, cap. Chan- cery. Articles against Cardinal Woolsey. Artic. 33, 35, 36.

^a Artic. sup. Cart. cap. 2. 18 E. 2. cap. ult. 5 E. 3. cap. 4.

^b 5 E. 3. cap. 2. 25 E. 3. cap. 1.

^c 25 E. 3. cap. 15.

^d 36 E. 3. cap. 2. Vid. Stanf. pl. cor. 37. b.

^e 27 H. 8. cap. 24.

^f Trin. 40. Eliz. coram rege. In a quo warrant. the lord Darcies case.

Rot. Parl. anno 28 E. 3. nu. 34.

At a parliament holden 4 Jacobi regis.

SEE the statutes of Artic. super Cartas, anno 28 E. 1. cap. 2. 18 E. 2. ca. ult. 5 E. 3. cap. 2. 25 E. 3. cap. 1. & 15. 27 E. 3. cap. 1. 36 E. 3. cap. 2. And before in the second part of the Institutes, in the exposition of the statute of Artic. super Cartas, cap. 2. you shall finde in what case a purveyor may be charged with felony, which briefly may be reduced to these four heads. First, ^a if any that take upon him to be a purveyor, or his deputy or servant make purveyance of any thing above twelve pence without warrant. Secondly, ^b or make purveyance of any thing above twelve pence without testimony and apprisement of the constable, and four honest men, and without delivery of tales. Thirdly, ^c or take any sheep with their woolles between Easter and Midsummer, and carry them to his own house and sheer them. Fourthly, ^d or make any takings or buyings, or take any carriage in other manner then is contained in their commissions, they shall have punishment of life and member: and this act remains still in force without alteration. The offenders may have the benefit of their clergie.

^e By this statute it is enacted, that purveyors assigned by commission shall make purveyance of victuals, corne, and other things, as well within liberties and franchises, as without, any grant, allowance, or other thing to the contrary, or let thereof notwithstanding: but the purveyors shall observe the statutes for them provided in every behalfe, as by that act appeareth. ^f Upon this act it was holden, that if the discharge of purveyance were by letters patents, this act makes it of no force: but if the discharge were by statute, then the purveyor is bound to observe the statute, as by the statute of 14 E. 3. cap. 1. *pro clero*, ecclesiasticall persons are discharged by statute, which the purveyor is bound to observe. See the statutes of 25 E. 3. statut. 5. cap. 21. & 43 E. 3. cap. 3. in what manner and in what time the kings butler or his lieutenant shall take wines, &c.

See more of purveyors in the fourth part of the Institutes cap. of the Counting house or Green cloth.

See lib. 8. fo. 45, 46. in Evans case, a commission for taking up of boyes for the kings chappell, the generall words well expounded.

By an act of parliament not in print, it is enacted that no purveyor arrested for any misdemeanour shall have any privy seal, to cause such as arrested him to come before the counsell to answer to the king, but have his remedy by the common law.

Upon a grievous complaint made at the parliament holden in the fourth year of our late sovereign lord king James, by the commons of the realm concerning many grievances suffered by his subjects in the execution of a commission granted to certain persons for getting of salt-peter, his majesties answer (amongst other things) was,

was, that he had never an intention to make any application of his prerogative therein, further then might stand with the lawfull, and necessary use thereof. And further his majesty was pleased out of his gracious care, and goodnesse to revoke and annull all commissions, or grants made to any person or persons, for and concerning digging, and working of salt-peter, intending to consider of such a course afterwards, as the same might be made without any just cause of complaint, as by the said royall answer (amongst other things) more at large appeareth. In pursuance whereof, by the said kings commandment, Popham chief justice, and all the justices of England, and barons of the exchequer, were assembled at Serjeants-Inne in Fleetstreet, in December, in the said fourth year, to resolve and certifie, what prerogative the king had for digging, and taking of salt-peter in the houses, buildings, or grounds of his subjects, that thereupon a new commission might be made accordingly, who upon often conferences, and mature consideration resolved as followeth.

First, where it was objected, that gunpowder was invented in Germany, within time of memory, in the reign of king E. 3. so as the king could not claim it by prescription: and that before the 31 year of the reign of queen Eliz. (which was the yeer after the Spanish invasion) we, as yet, find not any commission or licence granted by any king or queen of this realm to any for the digging or taking of salt-petre: and in the said 31 year of the said late queen, two commissions or licences were granted, the one particular, to George Constable esquire, to dig, open, and work during the space of eleven years for salt-peter within the counties of York, Nottingham, Lancaster, Northumberland, Cumberland, and the bishoprick of Durham, as well within our own lands, grounds, and possessions, as also within the lands, grounds, and possessions of any of our loving subjects within the counties aforesaid; and the consideration of the grant was, that he should deliver a great quantity of powder to be made by the said George Constable, and provided for the store of the queens majesty at a lower rate, then was paid for it before, with this further clause; [And further our will and pleasure is, that the said George Constable shall at his own proper costs and charges erect, make up, and lay all mud walls, stables, and grounds whatsoever so digged up;] whereupon it was inferred that no other buildings could be digged up by force of that commission, but only stables. The other commission was generall, made unto George Evelyn, Richard Hils, and John Evelyn, and extended throughout the realms of England and Ireland, and all other the dominions of the same, as well within our own proper lands, grounds, and possessions, as also within the lands, grounds, and possessions of any of our subjects, with the like clause of the erection and reparation, as is aforesaid, without naming of mansion houses by expresse words, and without any prohibition to the subject to dig for salt-peter in their own buildings or grounds.

Salt peter, *quasi*, salis petrae, colligitur aut ex materia quam veteres muri, rupes, et saxa exsudant, aut ex terra saluginosa et puta, quae in stabulis animalium urinam ad multos annos excepit, Latine *nitrum*.

[83]

In the accounts, &c. from the 21 of April 18 E. 3 for one year following anno Domini 1344. under the title of artificers and workmen (inter alios.) Gunners 6. And of their wages and stipends per diem, it is said (amongst others) gunners six pence. Latine bombardæ, tormenta, sclopi.

Pasch. 49 E. 3. Coram rege rot. 27. Oxon. diversi malefactores venerunt ad manerium, &c. cum arcubus, sagittis, baliscis et goons.

Vide Rot. Parl. 1 R. 2. nu. 38. William captain of the castle of Catherick, being charged for delivering it to the enemy, in the reign of E. 3. without commission, answered (inter alia) that the enemies brought to battery thereof nine peeces des grosses cannons.

Hollingsh. fo. 453.

Walsing. 10 R. 2. 1366.

Pol. Virg. De invent' rerum. fo. 2. ca. 11.

Pancerollus Nova reperta. Tit. 18. pag. 679. anno Domini 1378.

John More, pag. 196. anno Domini 1382.

Purveyance of
salt-peter.
See the 1. part
of the Institutes.
Magna Carta
cap. 21.

- As to the first, it was resolved by all, that forasmuch as the taking of salt-peter, was for the necessary defence, and safety of the realm that the king had a right of purveyance of it; and should not be driven to buy it in forain parts, which forain princes might restrain, and so this realm might want sufficient for the defence thereof, to the great perill, and hazard of the same: but the king was to take it, for the necessary defence of the realm, according to the limitations hereafter expressed; and it is no prejudice to the owners of the soyl, for the place that is digged must be made up again, and repaired in as good plight as it was beefore. Secondly, that this taking of salt-peter in the buildings or grounds of the subject, being a purveyance as is aforesaid, is an incident inseparable to the crown, and cannot be granted, demised, or transferred to any other, but ought to be taken only by the kings ministers, as other purveyances ought, and cannot be converted to any other use, then for the defence and safety of the realm, for which purpose only the law doth give to the king this prerogative; and it is not like to a mine of gold or silver in the ground of the subject, for there the king hath an interest in those metals, and not purveyance only. And if the powder which is so made by the kings ministers begin to decay, as it will doe within two or three years, then this either ought to be changed for other, or sold, and the money thereof comming to be employed for powder for the defence of the realm, and the kings ministers ought to make great provision of salt-peter, for that will last a long time, and when need is to make thereof gun-powder, which will be made before
- [84]
2. the navy can be put in readinesse, &c. Thirdly, the ministers of the king cannot in digging for salt-peter undermine, weaken, or impair any of the walls or foundations of any of the houses of the subject, be they mansion houses, or out-houses, as barns, stables, dove-houses, mills, or the like, neither can they dig the floor of any mansion-house, which serves for the habitation of man, because his mansion is the safest place of refuge, and safety of himself and his family, as well in sicknesse, as in health, and his defence, as well in the night, as in the day, against felons, and misdoers, neither can the kings ministers dig the floor of any barn of the subject employed for the safe keeping of corn, hay, &c. for the floor of a barn cannot be made dry, or serviceable again in a long time, but they may dig in the floors of stables, and oxehouses, so that they leave sufficient room there for the horses, and other beasts of the owner, and so that they repair the same again in convenient time, as well as it was before. They may also dig in the floors of cellars, and vaults, so that the wine, beer, or other necessary provision of the owner be not removed, or in any sort impaired: and they may dig any mud wals, which be not the wals of any mansion house, and in the ruines and decayes of any houses which be not preserved for the
 4. necessary habitation of man. Fourthly, they ought to make the places as well, and commodious for the owner, as they were before.
 5. Fifthly, they ought not to work in the possessions of the subject, but between the rising of the sun, and the going down of the same, so as the owner may make fast the doors of his house, and put it in defence against misdoers.
 6. Sixthly, they ought not to place or fix any furnace, vessell or other necessities in any house or building of the subject, without his consent, nor so neer any mansion as he by it may receive any prejudice or disquiet. Seventhly,

venthly, they ought not to continue in one place above a convenient time, nor return thither but after a long time. Lastly, that the owner of the soyle cannot be restrained from digging, or taking of salt-peter, for the property thereof is in the owner of the soyl, and the king hath but the purveyance thereof, and that every man might work that would, and then there should be more plenty of powder, and at a cheaper rate. And these resolutions are agreeable with that maxime, * That the common law hath so admeasured the prerogatives of the king, that they should neither take away nor prejudice the inheritance of any. And these monopolies being *malum in se*, and against the common laws, are consequently against the prerogative of the king, for * the prerogative of the king is given to him by the common law, and is part of the laws of the realm. Which resolutions were delivered in writing by Popham chief justice unto the kings privy councill, as the unanimous resolution of all the judges, and barons of the exchequer, and were by his majesties privy councill well allowed of, and approved, as Popham chief justice reported. Upon these resolutions these consequents do follow. First, if a man of his own authority, or by colour of any commission, licence, or grant, doth take upon him to take any salt peter in the buildings, or grounds of any other subject to make thereof gunpowder, in any sort to his own use, albeit he covenanteth, or agreeth to serve the king of so many lasts of powder: yet seeing it is but a purveyance, he cannot sell any powder thereof made to any of the kings subjects, or make any private benefit thereof: and if he doe, he may be indicted of digging, and taking of the salt-peter at the kings suit, and be grievously fined and imprisoned, for that it is a grand trespass with an high hand. Secondly, the party grieved may have his action of trespassse, and recover damages for the trespassse, &c. according to the quality of the trespassse.

^a Complaints made against purveyours in parliament.

^b By the statute of 9 R. 2. all statutes made concerning purveyours be confirmed, and to be put in execution, and that justices of peace have power to hear and determine their offences. See the fourth part of the Institutes, cap. 8. art. 33. 35. 36. against cardinall Woolsey.

7.
8.

* Pl. Com. 236.

* Stanf. Pl. Cor.
162. a.
Stanf. Prer. 5. b.

^a Rot. Parl.
4 H. 4. nu. 111.
Eodem anno 81.
9 H. 4. 15.
^b Rot. Parl.
anno 9 R. 2. nu.
31. not in print

C A P. XXV.

[85]

Of Felony in wandring Souldiers and Mariners.

1. **A**LL idle and wandring souldiers or mariners, or idle persons wandring as souldiers or mariners, shall be reputed felons, and suffer as in case of felony.

39 El. ca. 17.

So as not only he that is a souldier, or mariner in deed, but he that is an idle wanderer, and takes upon him to be a souldier

or mariner, though in troth he be none, is in danger of this law; for, as the preamble saith, they abuse the name of that honourable profession.

2. Every idle, and wandring souldier or mariner, which coming from his captain from the seas, or from beyond the seas, that shall not have a testimoniall under the hand of some one justice of peace of, or neer the place where he landed, setting down therein the time and place when, and where he landed, and the place of his dwelling and birth, unto which he is to passe, and a convenient time therein limited for his passage, is by this act adjudged a felon.

3. Or if he hath such a testimoniall, and shall exceed the time therein limited above fourteen days, he is by this act a felon, unlesse he fall sick by the way, so as after his recovery he settleth himself in some lawfull course of life, or resort to the place where he was born, or was last abiding: but in both these two cases he must be a souldier or mariner in deed.

4. If any such idle, and wandring souldier, or mariner, or other idle person wandring as souldier or mariner, shall forge or counterfeit such testimoniall, he is by this act a felon.

5. Or if he shall have with him or them any such testimoniall forged or counterfeit, knowing the same to be counterfeit or forged, he is also by this act a felon. And in both these last cases, as well he that is a souldier or mariner in deed, as he that is none, is in danger of this act.

And the offender against any of the articles of this statute shall not have the benefit of his clergie.

Justices of assise, justices of gaole delivery, and justices of peace, have power by this act to heare and determine the said felonies.

But if some honest person valued in the last subsidie to ten pounds in goods, or forty shillings in lands, or some honest freeholder, as by the said justices shall be allowed, will be contented before such justices to take him or them into his service for one whole yeare, and will become bound by recognizance, as the statute doth appoint, then they shall not proceed any further against him, unlesse such person retained depart within the year, without the licence of him, that so retained him; and then he is to be indicted, tried, and judged as a felon, and not to have the benefit of his clergie.

C A P. XXVI.

Of Felonie in Souldiers that depart from their
Captaines without License.

THIS statute is become of little force or use: for the ancient manner of retainer of souldiers whereunto that act referreth, is utterly altered: for then knights or gentlemen expert in war, and of great revenues and livelihood in their countrey, covenanted with the king to serve him in his war for such a time with such a number of men: and the souldiers made their covenant with their leaders or masters, and then they were mustered before the kings commissioners, and entred of record before them; and that was certified into the * exchequer, and thereupon they took their wages of the king, as it appeareth by many presidents of the exchequer, and may be gathered by the preamble and body of the act, and by the Register, where it appeareth, that a writ was framed upon that statute directed to a serjeant at armes *ad capiend' conductos ad proficiscend' in obsequium, &c.* And this was thought an excellent military policy, that the souldiers, (part whereof were of their own tenants) should be chosen and led by knights and gentlemen of quality of their owne countrey, with whom they must fight in war, and live withall in peace, when they returned into their countrey, in respect whereof, the souldier would the more cheerfully and obediently follow his leader, and the leader would the more respectfully and lovingly use his souldier when he is abroad. See the ancient forme of commissions for arraying and mustering of men in 5 H. 4.

By this act the benefit of clergie was not taken away from the delinquent.

The statute of 2 E. 6. cap. 2. extendeth only when the souldier departs after that he hath served the king in his war: and such an offender shall not enjoy the benefit of his clergie.

If any souldier being no captain, immediately retained with the king, which shall be in wages and retained, or take any preft to serve the king upon the sea, or upon the land beyond the sea, depart out of the kings service without licence of his captain (1), that such departing be taken, deemed, and adjudged felony. And that all the justices in every shire of England, where any such offenders be taken (2), have power to enquire of the said offences, and the same to hear, and determine, as they doe and may doe of felony, &c. expressed in the kings commission to them made, as though the same offences were done in the same shire; and also that the departing of such souldiers, and also their retainers, if it be traversed, be

18 H. 6. cap. 19.
5 Eliz. cap. 5.
extendeth it to
mariners and
gunners.

* By the statute
of 5 R. 2. cap.
11.

See the writ in
the Register 191,
directed to the
serjeant at armes.
5 R. 2. cap. 10.
Rot. Parl. 5 H.
4. nu. 29. the
like for keeping
of castles and
forts.

Rot. Parl. 5 H.
4. nu. 24, 25.

2 E. 6. cap. 2.
renued 4 & 5
Ph. and Mar.
cap. 3. 1 Ja.
cap. 25.

7 H. 7. cap. 1.
3 H. 8. cap. 5.

tried in the same shire, where they be for such a cause arrested, and arraigned.

Lib. 6, fo. 27.
Case de souldiers.
Dier 4 Eliz. 211.

Both these acts of 7 H. 7. and 3 H. 8. are perpetuall acts, for this word [king] includeth all his succession.

(1) *Without licence of his captain.*] The statute of 3 H. 8. is without licence of the kings lieutenant there.

(2) *That all the justices in every shire of England, where any such offenders be taken, &c.*] This act of 7 H. 7. extends to all the kings justices in every shire, viz. justices of assise, gaol delivery, oier and terminer, and of the peace. And if the offender be taken in the county where the kings bench set, he may be indicted, &c. there: but this clause in 3 H. 8. is restrained to justices of peace. This clause in both the said statutes is cumulative, and for more speedy proceeding with the offender. But admit the offender be never taken, yet may he be indicted of felony in the county where the departure was, and if he appear not, he may be outlawed, for by the first clause, the offence is made felony, and the second clause is affirmative, and not privative.

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See Stanf. Pl.
cor. fo. 168. c.

He or they so offending shall not enjoy the benefit of his clergy.

This branch in the act of 7 H. 7. is generall, but in the act of 3 H. 8. there is an exception out of the like branch, viz. of men being within orders of holy church. So as it differeth much, whether he be indicted upon the one statute, or the other.

But observe what punishment the ancient law of England inflicted upon the souldier that departed from the kings host, both before, and since the conquest. *Item qui fugiet à domino, vel scio suo pro timiditate belli, vel mortis, in conductione heretochii sui in expeditione navali, vel terrestri, perdat omne quod suum est, et suam ipsius vitam, et manus mittat dominus ad terram quam ei antea dederat.* For the exposition of *Heretochius* and *Heressite*, see the fourth part of the Institutes, cap. *Court de Chivalry*.

Lamb. Inter.
leges Edovardi
fo. 136.
Hoven. Annal.
35. Pœna Here-
ssitæ.

Now concerning armour, arms, charges of souldiers, mustering of them, &c. See the statutes in print of Confirmat. Cart. 25 E. 1. Vet. Magna Cart. 2. parte, fol. 35. 1 E. 3. cap. 5. 18 E. 3. ca. 7. 25 E. 3. cap. 8. 4 H. 4. cap. 13. 11 H. 7. cap. 7. and 3 H. 8. ca. 5. and 4 & 5 Ph. & Mar. cap. 3. for appearing at musters, &c. But 4 & 5 Ph. and Mar. cap. 2. an act for having of horse, armour, and weapon is repealed by the statute of 1 Ja. ca. 25.

An act not in print, Rot. Parl. anno 5 H. 4. nu. 24, 25. for ar-
raying and mustering of men, for watching of beacons, &c.

Records of parliament, 4 H. 4. nu. 48. 7 H. 4. nu. 124. 1 H. 5. nu. 17.

Book cases. 48 E. 3. 3, 4. 21 E. 4. 17. per Catesby. 9 E. 4. 26. lib. 7. fo. 7, 8.

See the second part of the Institutes, Confirmat. Cart. cap. 5. *ul; supra.*

Vide Pasch. 16 E. 2. Phelip Master del Hospit. de S. Katherins case, in *libro meo*, fo. 83. b.

C A P. XXVII.

Of Felony to marry a second Husband or Wife,
the former Husband or Wife living.

IF any person (1), or persons within his majesties dominions of England and Wales, being married (2), doe at any time after marry any (3) person or persons, the former husband or wife being alive, that then every such offence shall be felony, &c. 1. 1a. cap. 11.

This is the first act of parliament that was made against polygamy. *Polygamia est plurium simul virorum, uxorumve connubium.*

The difference between bigamy, or trigamy, &c. and polygamy is, *quia bigamus seu trigamus, &c. est qui diversis temporibus, et successive duas, seu tres, &c. uxores habuit. Polygamus, qui duas vel plures simul duxit uxores.*

(1) *If any person.*] This law is generall, and extendeth to all persons, of what estate, or degree soever.

If the man be above the age of fourteen, which is his age of consent, and the woman above the age of twelve, which is her age of consent, though they be within the age of one and twenty, are within the danger of this law, which appeareth by this, that this act extendeth not to a former marriage made within the age of consent, as hereafter shall appear.

Being married, &c.] This extendeth to a marriage *de facto*, or voydable by reason of a precontract, or of consanguinity, or of affinity, or the like: for it is a marriage in judgement of law untill it be avoided, and therefore though neither marriage be *de jure*, yet they are within this statute.

(3) *Doe at any time marry.*] This second marriage is meerly void, and yet it maketh the offender a felon.

And the party and parties so offending, shall receive such and the like proceeding, triall and execution in such county, where such person or persons shall be apprehended, as if the offence had been committed in such county, where such person or persons shall be taken or apprehended.

See before the exposition of the statutes of 7 H. 7. and 3 H. 8. concerning departing of souldiers, &c.

Out of the generality of this law, there be five exceptions: First, it extendeth not to any person or persons, whose husband or wife be continually remaining beyond the seas, by the space of seven years together. By this branch notice is not materiall, in respect of the commorancy beyond sea.

Secondly, it extends not, when the husband or wife shall absent him or herself, the one from the other, by the space of seven years in any parts within his majesties dominions, the one of them not knowing

See the 1. part
of the Institutes.
sect. 104.

See 22 E. .
Consultation. 5.
The opinion of
the doctor.
Pains case lib. 9.
fo. 72.

knowing the other to be living within that time. Here notice is materiall, in respect the commorance is within the realm.

* Thirdly, nor to any person or persons, that at the time of such marriage be divorced by any sentence had in the ecclesiasticall court.

There be two kinds of divorces, the one that dissolveth the marriage *à vinculo matrimonii*; as for precontract, consanguinity, &c. and the other *à mensa et thoro*; as for adultery, because that divorce by reason of adultery, cannot dissolve the marriage *à vinculo matrimonii*, for that the offence is after the just and lawfull marriage. This branch in respect of the generality of the words, priviledge the offender from being a felon, as well in the case of the divorce *à mensa et thoro*, as where it is *à vinculo matrimonii*, and yet in the case of the divorce *à mensa et thoro*, the second marriage is void, living the former wife or husband. And if there be a divorce *à vinculo matrimonii*, and the adverse party appeal, which is a continuance of the former marriage, and suspend the sentence, yet after such a divorce, the party marrying is no felon within this statute, in respect of the generality of this branch, although the marriage be not lawfull.

Fourthly, nor to any person or persons, where the former marriage is by sentence in the ecclesiasticall court declared to be void and of no effect.

Fifthly, nor to any person or persons, for or by reason of any former marriage made within age of consent: hereby it appeareth that the makers of the law intended that this act should extend to every person above the age of consent.

If the man be above fourteen, and the wife under twelve, or if the wife be above twelve, and the man under fourteen, yet may the husband or wife so above the age of consent, disagree to the espowls, as well as the party that is under the age of consent; for the advantage of disagreement must be reciprocal. And so it was resolved by the judges and civilians, Trin. 42 Eliz. in the kings bench, in a writ of error between Babington and Warner. So as if either party be within age of consent, it is no former marriage within this act.

The offender against this statute may have the benefit of his clergy.

If he be a nobleman and lord of parliament, he shall be tried by his peers, albeit there be no provision speciall for it: for of common right, (that we may say it once for all) in case of treason, felony, and misprision of treason or of felony (as hath been said before) he is to be tried by his peers.

I find that by the ancient law of England, that if any Christian man did marry with a woman that was a Jew, or a Christian woman that married with a Jew, it was felony, and the party so offending should be burnt alive.

Contrahentes cum Judæis, Judæabus, pecorantes, et sodomitæ in terra vivi confodiantur, &c. Fleta lib. 1. ca. 35. §. *Contrahentes.*

Trin. 42 Eliz.
Coran rege.
Inter Babington
and Warner.

Marriage in
some sort felony
by the com-
mon law.

C A P. XXVIII.

Of Felony for any having a Plague sore upon him, contrary to Commandment goeth abroad, &c.

IF any person infected with the plague, commanded (by such persons as are appointed by the act) to keep house, shall contrary to such commandment wilfully and contemptuously goe abroad, and shall converse in company, having any infectious sore upon him uncured, such person shall be adjudged a felon. 1 Jac. ca. 31.

This is felony, albeit no other person by such means be infected, for this statute was made to prevent the most horrid and fearfull infection of the plague. The law was generall, and extended to all estates and degrees whatsoever, and was grounded upon the law of God: and the reason of the law of the realme is, that the infectious sick should be removed from the whole. The party offending might have had the benefit of his clergy. Levit. cap. 13.
Numb. cap. 5.
Regist. F. N. B.
234. Bre. de le-
proso amovendo
Bract. lib. 5.
f. 421. a.
Brit. fo. 39. 82.
Fleta, li. 6. ca.
39. 22 E. 3.
Rot. Claus. 2.
parte, nu. 14.

Here is a rare proviso, That no attainder of felony by vertue of this act, shall extend to any attainder, or corruption of blood, or forfeiture of goods, chattels, lands, tenements, or hereditaments.

In this proviso these things are to be observed: first, that by the avoyding of the corruption of blood, the wives dower is impliedly saved: for where the heir shall inherit, the wife shall be endowed against the heir. Secondly, that there shall be * no forfeiture of goods, or chattels, which is rare, and the like we have not observed before, and by consequent the offender may make his will and testament, and if he doe not, the ordinary ought to grant administration of the goods and chattels, as he ought to doe in other cases.

* Nota.

These words [to any attainder or] must be omitted, and the sense to be, to any corruption of blood, for (as it is printed) it is, that no attainder of felony shall extend to any attainder, &c.

This act is become of no force for want of continuance, and is expired since we wrote this chapter, therefore to be put out of the charge of the justices of peace.

C A P. XXIX.

Of Felonie in Jaylers by Dures of Imprisonment, &c. by Statute, and by the Common Law.

14 E. 3. ca. 10.
Geol in French
is a prison. Geo-
lier a keeper of
a prison. An-
glice, a jayl, or
jayler.

* An approver.
3 E. 3. Cor. 295.

IF it happen that the keeper of the prison, or underkeeper (1) by too great dures of imprisonment (2), and by pain make any prisoner that he hath in his ward to become an * appellor (3), against his will (4), and thereof be attainted, he shall have judgement of life and member (5).

Before the making of this statute, if a jayler had by dures of imprisonment made his prisoner become an approver, to appeal honest men for his own private, of intent to have of their goods, when they were committed to his custody, and to retain them in prison without being let to mainprise, and the appellees upon his appeal be hanged: this is felony in the jayler by the common law: but if the appellees were acquitted, then it was no felony, but a great misprison in the jayler, which was one of the causes of the making of this act: for by this act, if the prisoner become an approver against his will, whether the appellees be acquitted, or attainted, or after the approvement not proceeded with, and whether the approvement be true or false, so it be by dures of imprisonment, and against the will of the prisoner, it is felony. * For it is not lawfull for any man to excite or stir any other to a just accusation, complaint or lawfull suit, for *culpa est se immiscere rei ad se non pertinenti*; (and so was ^a it resolved Mich. 7. Ja. in the star-chamber, in sir John Hollis his case, by the whole court) much more to doe it by dures of imprisonment, most of all by a jayler, who hath the custody of the prisoner committed to him, to enforce him by dures to become an approver. And therefore this law hath made it felony in the jayler or under-jayler.

(1) *Keeper of the prison, or under-keeper.*] If he be keeper, or under-keeper, *de jure*, or *de facto*, by right or by wrong, he is within the purview of this statute.

(2) *By too great dures of imprisonment.*] Every imprisonment is taken and deemed in law *duritia*, *dures*: a little addition to it by the jayler is too great dures in this case.

(3) *To become an appellor.*] That is an approver.

(4) *Against his will.*] That is, when the prisoner never would have done it of his own will, if the jayler, or under-jayler had not enforced him thereunto.

(5) *Judgement of life or member.*] * These words doe imply felony. For this offence, the offender shall have the benefit of his clergy.

^b If the jayler keep the prisoner more straitly then he ought of right, whereof the prisoner dyeth, this is felony in the jayler by the

* 1 E. 3. ca. 14.
20 E. 3. cap. 5.
1 R. 2. ca. 4.
W. 1. cap. 36.
11 H. 4. 2. 91.
22 E. 3. 15.
See the exposition
of W. 1.
c. 28.

^a Mich. 7 Jacobi
in curia stellat.
Sir John Hollis
case.

11 H. 4. 73.
simile. 13 E. 3.
bar. 253. simile.

* W. 2. cap. 34.
28 E. 3. ca. 3.
13 R. 2. stat. 2.
cap. 3.

1 E. 2. De frang.
prisonam.

9 E. 4. fo. 26.
Br. Cor. 203.

^b Britton, fo. 18.
Fleta, lib. 1, c.
26. versus fi-
nem. Mirror
cap. 1.

§. 9 De homi-
cidio.

the common law. And this is the cause, (as before hath been said) that if a prisoner die in prison, the coroner ought to sit upon him. See before cap. Petit Treason, fo. 34. how prisoners are to be demeaned.

How gaols are rejoined and united to the office of sheriffs, see this statute of 14 E. 3. ca. 10. 19 H. 7. ca. 10. lib. 4. fo. 34. Muttons case. Adde thereunto Rot. Parl. 18 E. 3. nu. 43. and so was it decreed in Fortescues case, in the exchequer chamber, anno 2. Car. regis.

nu. 43. 2 Car. Regis in the exchequer chamber,

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14 E. 3. ca. 10.
19 H. 7. c. 10.
Li. 4. fo. 34.
Muttons case.
Parl. 18 E. 3.
Fortescues case.

C A P. XXX.

Of Felony by bringing in, Payment, or Receipt
of certaine Money.

IT is felony to make, coin, buy, or bring in, and put in payment, &c. any galley half pence, fuskyn, or dotkyn.

3 H. 5. cap. 1.
Stat. 1. Rast.
Abb. tit. Money
nu. 27.

The reason of this law was, for that these moneys were base, and not of the allay of sterling, which was (amongst others) the cause of the making of the generall law of 9 H. 5. cap. 6. stat. 2.

9 H. 5. c. 6.
Stat. 2.

It is felony to pay, or receive for payment any money called blanks. For the better understanding of this statute, it is to be known, that these blanks were white money coyned by king H. 5. in France after his victory at Agincourt, and league with France, whose style then was, *rex Angliæ, regens et hæres Franciæ*. And they were called blanks or whites in respect of the colour, because at the same time he coyned also a salus in gold, the salus, being of the value of twenty two shillings, was of the allay of sterling: but the blanks, which were much more common, being each of them valued at eight pence, were not of the allay of sterling, and therefore they only were decried by the said act of 2 H. 6.

2 H. 6. ca. 9.

See the second part of the Institutes. Artic. super Cartas cap. 20.

For either of these offences of felony the offender may have his clergy.

C A P. XXXI.

Of Felony for Transportation of Silver, or Importation of false or evill Money, &c.

Mirror, c. 1. §. 3. Inter les articles de viels roys ordeins. Rot. Parl. 17 E. 3. nu. 15. not printed.

^a See Britton cap. 5. fo. 10. b. Cest allay est folongue le forme et usage del realm.

Mirror. ca. 1 §. 3. before the conquest. & cap. 1. §. 6. & cap. 5. §. 1. See inter leges Æthelstani. c. 14. Canuti ca. 8. Fleta, lib. 1. ca. 22. Glanv. li. 14. c. 7. Of what weight and allay the kings money shall be. 25 E. 3. ca. 13. 9 H. 5. ca. 11. See before cap. Treason. Verb. *Sa morye.*

See the second part of the Institutes. Artic. super cartas cap. 20.

^b This is felony. See the like in the second part of the Institutes. 1 E. 2. De frangentibus prisonam. 14 E. 3. 10. &c.

^c The reward of the searchers if they be diligent, &c.

DEFENDUE fuit que nul argent serra transport hors del realm.

This was the ancient law of England long before the conquest.

At the parliament holden anno 17 E. 3. as well the transportation of silver, as the importation of false and evill money, is enacted by authority of that parliament to be felony. And also if the searchers mentioned in the act be assenting to the bringing in of false money, or willingly suffering silver or money to be transported, it is also made felony. But because this act was never printed nor translated into English, and for that there be other things observable, enacted thereby, worthy to be known, we will transcribe the same, *de verbo in verbum in proprio idiomate.*

* Le parlement tenu a Westm. a la quinzeme de Pasch. du raign nostre seignior le roy Edward tiers apres le conquest dys et septisme.

ITEM accorde est de faire une monnoie des bones esterlings en Engleterre du pois et del ^a alay del auncient esterling, que avera son cours en Engleterre entre les grandz et la comune de la terre, et la quele ne serra portes hors du roialme d'engleterre en nulle manere, ne pur quecunque cause que ceo soit. Et en case que les Flemings voillent faire bone monnoie d'argent grosses ou autres accordant en alay es bones esterlings, que tiel monnoie ait cours en Engleterre entre marchand et marchand et autres qi la vodroient resceuire de leur bone gree, issint que nul argent soit portes hors du roialme.

Item est accordes et assentus, que bones gents et loialx soient assignes es ports de miere, et ailours, ou miefter serra, de faire la serche que nul argent soit portes hors du roialme en monnoie n'autrement, forspris que les grandz quant ils vont per dela qils pensent aver vesseals d'argent pur servir leur hostels: Et que nul soit cy hardy ^b de porter fausse et malvois monnoie en roialme, sur paine de forfeiture de vie et de membre, et a faire eschanges a ceux qi passeront la miere d'or pur leur tones Esterlings a la value.

Item assentus est et accordes, que les dits sercheours, per cause qils ferreront leur offices plus diliagement et plus loialment, ^c ils eient la tierce partie de tote la fauxe monie, qils purront trover
* portee

portee deins le roialm a lour proffit demeen : et en mesme la manere eient la tierce partie de la bone monoie quele ilz troveront en la miere passent hors de la terre. Et en case qils soient troves negligents ou rebealx a tieux serches faire, ^d que lour terres et tenements, biens et chateux soient seises en la main le roy, et lour corps pris, et detenus tanque ils eient fait fine au roy pur lour disobeisance. Et en case quils soient ^e assentants de porter tiels fauxe monoie, et de sueffrire sachantement l'argent ou monoie autrement, (forspris que les grandz quant ilz vont per dela qils pensent aver vesseals d'argent pur servir lour hostels come de suis est dit) estre mesmes hors du roialme, eient judgement de vie et de membre.

^d the punishment of them if they be negligent, &c.

^e Their assent to the bringing in of false money, or wittingly to suffer silver, or money, &c. to be transported, is felony.

Item, IT is accorded to make money of good sterling in England of the weight and allay of the ancient sterling, which shall be currant in England between the great men and commons of the land, and the which shall not be carried out of the realm of England in any manner, nor for any cause whatsoever. And in case, that the Flemings will make good money of silver grosse or other, according, in allay of good sterling, that such money shall be currant in England between merchant and merchant, and others, who of their own accord will receive the same, so that no silver be carried out of the realm.

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Item, It is accorded and assented, That good and lawfull men be assigned in the ports of the sea, and elsewhere, where need shall be, to make search, that no silver be carried out of the realm in money or otherwise, (except that the great men may when they goe out of the realm, have silver vessels to serve their houses) and that none be so hardy to bring false and ill money into the realm upon pain of forfeiture of life and member, and to make exchanges with them, that shall passe the sea, of gold for their good sterling to the value.

Item, It is assented and accorded, that the said searchers, because they may doe their offices more diligently and more lawfully, shall have the third part of all the false money that they can find to be brought into the realme for their own benefit; and in the same manner they shall have the third part of the good money which they shall find upon the sea passing out of the realm. And in case they shall be found negligent or disobedient in making such searches, that their lands and tenements, goods and chattels shall be seised into the kings hands, and their bodies taken and detained untill they have made fine to the king for their disobedience. And in case they shall be assenting to the bringing in of such false money, or wittingly shall suffer silver or money (except vessels of silver for the great men when they goe out of the kingdome to serve in their houses, as before is said) to be transported

out

out of the realme, they shall have judgement of life and member.

The offenders in case of felony made by this act may have the benefit of their clergy.

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C A P. XXXII.

Of Felonie for carrying of Wooll, Woolfels, Leather, or Leade out of the Realme.

27 E. 3. cap. 3.
the statute of the
Staple.

Mirror, cap. 1.
§ 3. Inter les
artic. per vieles
royes ordeins.
Defendu que nul
de amefnatt
leyne hors del
realme.

Cap. 11.

Cap. 12.

Cap. 13.

NO merchant, English, Welch, or Irish, shall carry any manner of wools, leather, woolfels or lead, out of the said realme and lands, upon paine of forfeiture of life and member, nor shall transport any of the said wares or merchandizes in the name of merchant strangers, nor shall send or hold their servants, &c. in the parts beyond the sea to survey the sale of the said wares or merchandizes, or to receive the money coming of the sale of the same, nor take payment of gold or silver, nor of any other thing in recompence or commutation, or in the name of payment in the parts beyond the sea out of the realme and lands abovesaid of merchandizes sold in England, Ireland, or Wales, touching the staple, but that all such payment shall be made in gold or silver, or merchandizes in England, Ireland, or Wales, where the contract was made, upon paine of life and member.

That no merchant privie nor stranger, nor any other, of what condition that he be, go by land or by water towards wines, or other wares or merchandizes coming into our said realme or lands, in the sea, nor elsewhere to forestall or buy the same, or in other manner to give earnest upon them, before that they come to the staple, or to the port where they shall be discharged; nor enter into the ships for such cause, till the merchandizes be set to land to be sold, upon paine of losse of life and member.

No merchant privie, stranger, or other shall carry out of our realme of England, wools, leather, or woolfels to Barwick upon Twede; nor elsewhere, nor into Scotland upon the like paine, nor that any merchant, nor any other sell his wools, woolfels, or leather, to any of Scotland, nor to any other to carry into Scotland: upon the like paine.

If the merchants or other people of Ireland or Wales, after they be in the sea with their merchandizes, do passe to any place, other then to the staples in England: it is felony.

No

No merchant, or other shall make any conspiracie, confederacy, &c. or ill device in any point, that may turn to the impeachment, disturbance, defeating, or decay of the staples, &c. and if any do, and be thereof attainted before the major and ministers of the staple, or other whom the king shall assigne, he shall incurre the paine of losse of life and member.

Cap. 25.

Item, ou auterfoitz fuit orden en * lestatuts de lestaple que nul Englois passera la mere ove leynes, quire, pealtz lanuts, ne per auter, sur peine de forfeiture de vie et member, terres et tenements, biens et chateux: est accord que la forfeiture de vie et member soit ouste de tout en lestatute de lestaple, et que nul home soit impeach por tiel forfeiture de vie et member, cibien in temps passe come avenir, la forfeiture des terres et tenements, biens et chateux esteant en sa force. The same in English.

38 E. 3. cap. 6.
27 E. 3. ca. 3,
&c. stat. Stapulæ.

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Also, where heretofore it was ordained in the statutes of the staple, that no English man should passe the sea with wools, leather, woolfels, nor by other, upon paine of forfeiture of life and member, lands and tenements, goods and chattels. It is accorded that the forfeiture of life and member be ousted in the whole in the statute of the staple, and that no man be impeached by such forfeiture of life and member, as well in times past, as to come, the forfeiture of the lands and tenements, goods and chattels, being in his force.

By the expresse letter of the body of this law, the forfeiture of life and member is ousted *de tout* in the statute: therefore it is holden, that the felony is taken away throughout the statute, but the forfeiture of lands and goods remaineth by the expresse letter of this act.

By the statute of 18 H. 6. no man shall carry wool, or woolfels, out of this realme to other places, then to the staple at Callice, without the kings license, upon paine of felony, &c. And that as well commissioners assigned, as the justices in every county where such wools and woolfels shall be so carried out, have power and authority to enquire of the premises, and them to hear, and determine, &c.

18 H. 6. cap. 15.
Stanf. Pl. Cor.
37. b.

But this act extendeth not to wools which shall passe the strait of Marroke. And this is a perpetuall law, and cannot be expired, as it is supposed in the last impression of the statutes at large, but it extendeth only to wools and woolfels. The offender herein may have his clergie.

And for the better understanding of ancient statutes and records concerning wools, it is necessary to explaine certaine words and termes. By the statute of 25 E. 3. cap. 9. a sack of wool contains but twenty six stone, and every stone fourteen pound, where before it was ^a twenty eight stone.

^a Compos. de ponderibus vet. Mag. Carta, 2 part. fo. 31. Saccus lanæ. Rot. Parl. 27 E. 3. nu. 53.

Pochet of wool, *unde poshettum*, that is, a little poke or sack containing halfe a sack of wool. Sarpler, *unde sarpleia*, is also halfe a sack, and is derived from the French word *sarpillier*, which signifies

III. INST.

I

nifieth

nifieth a wrapper, within which wrapper halfe a sack is contained.

^b Composit. de ponderibus, ubi supra.

^b A weigh of wool, *unde waga*, is halfe a sack.

A tod or toit of wool, *unde toddum lanæ*, containeth two stone, and is derived from the French word *toilet*, which is a wrapper, within which by usage two stone of wooll is foulded: some fetch it from the Flemmish word *dodderem*, which signifieth *nectere*, to weave, because it is woven into cloth. *Petra lanæ* is a stone of wooll, so called, because the weight, being a stone, containes fourteen pound.

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C A P. XXXIII.

Against Transportation of Iron, Brasse, Copper, Latten, Bell-metall, Pan-metall, Gun-metall, or Shroofe-metall, (Tinne and Lead only excepted.)

28 E. 3. cap. 5.
33 H. 8. cap. 7.
2 E. 6. cap. 37.

See the penalties in the statutes

themselves, which are thought to be too weak.

Ferrum a feri-endo.

Timber is a Saxon word, in old French, *Ma-rem*, unde *Ma-remium*, Latine, *ligni materia*, vel *lignum ædificatorium*.

* Terra fullo-nica.

THE transportation of these are prohibited by divers acts of parliament upon the penalties therein expressed. And hereby is prohibited the transportation of any gunnes whatsoever, a necessary law, and worthy of due execution.

And we have observed, that God hath blessed this realme with things for the defence of the same, and maintenance of trade and traffick, that no other part of the Christian world hath the like: viz. Iron to make gunnes, &c. more serviceable and perdurable then any other. Secondly, timber for the making and repairing of our navie, and especially of the knees of the ships, better then any other. Thirdly, * our fullers earth is better for the fulling of our cloth, then any other. Fourthly, our wooll makes better cloth, and more lasting and defensible against winde and weather, then the wooll in any nation out of the kings dominions; and many other speciall gifts of God.

But here will we stay, and pray, that none of these may be transported for many inconveniencies, that will follow thereupon.

C A P. XXXIV.

Of Felony for stealing of a Faulcon.

37 E. 3. cap. 19.

EVERY person (1) that findeth (2) any falcon (3), tercelet (4), lannner, or laneret (5), or any other falcon, that is lost of his lords (6), that forthwith he shall bring it to the sherif of the county, and that the sherif make proclamation (7), &c. and if any steal any hawk (8), and the same carry

carry away not doing the ordinance aforesaid, it shall be done of him as of a thief that stealeth a horse (9) or other thing.

The statute of 34 E. 3. inflicted the penalty for the concealing and taking away of the hawk, two years imprisonment, and the price of the hawk to the lord, if he hath wherewith, and if not, he shall the longer abide in prison. This act of 37 E. 3. maketh the offence felony.

34 E. 3. cap. 22.

The new printed book of the statutes at large, in stead of these words, (or any other falcon) hath, or any other hawk.

Printed for the society of stationers, 1618.

I have seen some manuscripts (in these words) in the original tongue, wherein the statute was published. *Que quecunque person que trove faucon, tercelet, lanier, ou lanyret, auctor ou auter faucon.* And both these differ from the truth of this law. For the first extendeth this act to any hawk whatsoever. And the manuscript to *auctor* or *autor*, a goshawk, whereas in truth, this law extendeth only to such as be of the kinde of faulcons, being long winged hawks, which many times by flying far off are lost, and not to any short-winged hawk, as the goshawk, the tercel of the goshawk, the sparhawk, &c. And in the body of the act this word (faulcon) is ever used, and not this word (hawk) as hereafter appeareth. We would have been glad to have cleared this point by the record of the parliament roll, but the roll of this act is not to be found, and yet being a generall law, the judges are to take notice thereof: and that which I have set down, as the words of the law, agreeth with the first impression thereof, and with all succeeding impressions saving the last.

See hereafter, cap. Larceny, verb. Personall goods, &c.

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Lib. 8. fo. 27, 28. In casu principis.

(1) *Every person.*] This is a generall law, and extendeth to all persons of what degree or sex soever.

(2) *That findeth.*] Note by the common law the felonious taking of any hawk long-winged, or short-winged, from the park, &c. or from the person of any man, with a mind to steal her, is robbery: but the finding of a faulcon, though he concealed, denied, or sold her, was no felony, but by this act.

(3) *Any faulcon.*] By this and the last words, or any other faulcon, it appeareth that only faulcons are within this law, as besides those that are here named, the gerfaulcon, *gierfalco*, or *ardearius*, and the tercell, which is called a jerkin; and the lanner is called *falcunculus*. But the merlyn, which is called *asalo*, and the hobby which is called *alaudaria*, though they be long-winged hawks, yet being not of the kind of faulcons they are not within this statute, neither is any short-winged hawk, as the goshawk, the tercell of the goshawk, or the sparhawk, &c. as has been said, within this act.

(4) *Tercelet.*] This is the tercell of the faulcon, called a tercell gentill, the male of the faulcon called *terciolus*, *quia tertia parte minor sit femella*, because the tercell is a third part lesse then the female.

(5) *Lanner and laneret.*] These (as hath been said) are of the kind of faulcons, which appeareth not only by the name *falcunculus*, but by the words of the act, for having named the lanner and laneret, it is said, or any other faulcon.

Albeit these hawks, that shall be so lost, have no vervels, yet must

must the finder carry them to the sherif, for vervels are not required by this act. The only thing that the finder is to doe, to save himself from felony, is forthwith (the word in the originall is *maintenant*) after his finding to carry the hawk to the sherif.

(6) *That is lost of his lords.*] Lords are taken here for the owners, the word in the original is *seignior*, which signifieth as well a proprietary, as a lord.

(7) *To prove reasonably*] This is not intended according to the generall sense of this word (proof) that is, by a jury of twelve men, but (reasonably,) that is, by vervels, or by marks, or by other proof to the sherif.

(8) *And if any steal any hawk, &c.*] The concealing and carrying away of the hawk, not bringing the same to the sherif according to this ordinance, is adjudged a stealing by this act. And yet if a man finde goods, and conceal or deny them, it is no felony.

(9) *As of a thief that stealeth a horse.*] But yet by the common law one hath not as good and absolute a property in hawks, being *feræ natura*, and reclaimed for delight and pleasure (for they may become wild again, and return to their naturall liberty) as in a horse, or any other thing of profit: but the concealing and carrying away of the hawk reclaimed, being found was no felony before this statute, no more then any thing of profit, because the party came to the hawk by finding. See more hereof in the chapter of larceny. A hawk that is not reclaimed is *nullius in bonis*, but *occupanti conceditur*, and he that first getteth the hawk enjoyeth it.

In this act four things are to be observed. First, that the sherif must make proclamation in all the good towns of the county that he hath such a faulcon in keeping. Secondly, if none come to challenge the faulcon within four months, if the finder be under the degree * of a gentleman (which here is called *un simple home*) the sherif shall have the falcon, paying reasonable costs, &c. Thirdly, if the finder be a gentleman, and no challenge by the owner within four months, then he shall have the faulcon, paying reasonable costs, &c. Fourthly, it is to be observed, that in these two latter branches, the last printed book hath this word (hawk :) but in the originall, and all the other printed books, the word is (falcon) under which word, all the rest mentioned in this act are included.

For this offence of felony the offender shall have the benefit of his clergy, for at the time of the making of this act he that had stolon a horse should have had his clergy. See Stanf. Pl. Coron. fo. 37.

10 E. 4. 1.
7 R. 2. barre
241. Lib. 5. fo.
108 Sir Hen.
Constables case.

14 El. Dier, 307.
Fines case.
Lib. 7. fo. 17.
in case de Swans.

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* Who shall be
accounted in
law a gentleman;
see the second
part of the In-
stitutes the sta-
tute of Addi-
tions. 1 H. 5.
c. 5. See before
c. 23. 3 Jac.
ca. 4. verb. And
that if any gent.

C A P. XXXV.

Congregations, &c. by Masons in their generall Chapters, &c.

IT is ordained and established that no congregations and confederacies shall be made by masons in their generall chapters and assemblies, whereby the good course and effects of the statutes of labourers are violated and broken, in subversion of law; and if any be, they that cause such chapters and congregations to be assembled and holden, shall be adjudged felons.

3 H. 6. ca. 1.

The cause wherefore this offence was made felony, is, for that the good course and effect of the statutes of labourers were thereby violated and broken. Now all the statutes concerning labourers before this act, and whereunto this act doth refer are repealed by the statute of 5 Eliz. cap. 4. whereby the cause and end of the making of this act is taken away, and consequently this act is become of no force or effect: *cessante ratione legis, cessat ipsa lex*. And the indictment of felony upon this statute must contain, that those chapters and congregations were to the violating and breaking of the good course and effect of those statutes of labourers, which now cannot be so alledged, because those statutes be repealed. Therefore this would be put out of the charge of justices of peace written by * master Lambard.

2 E. 3 de servientibus, ca. 1. &c. 25 E. 3. De servientibus c. 1. &c. 5 El. ca. 4.

Cessante causa seu ratione legis cessat ipsa lex.

14 H. 7. 11.

Per Fineux simile. 27 H. 8.

4. b. Aide simile

10 E. 3. 8. Account per Shard.

26 H. 6. Examination 14.

* Lambard, page

227. vide Stanf.

37. b.

C A P. XXXVI.

[100]

Of Felony by bringing in of Buls of Excommunication, &c.

IF any man (1) bring or send into this realm, or the kings power, any sommons, sentence, or excommunication (2) against any person of what condition that he be, for the cause of making motion, assent, or execution of the statute of provisors (3), he shall be taken, arrested, and put in prison, and forfeit all his lands and tenements, goods and chattels for ever, and incur the pain of life and member (4). And if any prelate make execution (5) of such sommons, sentence, or excommunication, that his temporalties be taken, and abide in the kings hand till due redresse and correction be thereof made.

13 R. 2. Stat. 2. cap. 3.

And if any person of lesse estate then a prelate, &c. make such execution, he shall be taken, arrested, and put in prison, and have imprisonment, and make fine and ransome by the discretion of the kings counsell.

By the common law when any person, either ecclesiasticall or temporall, should by pretext of forain power impugne or attempt to frustrate any of the laws of the realm, there lieth a writ called *ad jura regia*: if it were by an ecclesiasticall person beneficed within this realm, then the writ is.

Regist. fo. 61. b.

Rex, &c. salutem. Turbamur, nec immerito, et movemur dum illos qui sub nostro degunt dominio, et ibidem beneficiis et redditibus honorantur, quo prætectu in defensione, et tuitione jurium regie coronæ nostræ ipsos nos assistere concederet, eadem jura erectis contra nos cervicibus conspiciamus satagentes pro viribus impugnare, &c.

Ibidem, 60. b.

Ibid. 61. b. & 62.

The general writ is, *Rex, &c. ad jura coronæ nostræ integra et illæsa pro viribus conservanda, eo amplius curam et operam adhibere nos convenit studiosam quod ad hoc est debito astringimur vinculo juramenti, et alios conspiciamus, ad ipsorum jurium enervationem anhelare*: and particularly against provisions. So as provisions, &c. were, as by these writs it appeareth, against the common law of the realm, but sufficient punishment was not thereby inflicted: therefore this, and other statutes were made.

And here it is worthy of consideration, how the laws of England are not derived from any forain law, either cannon, civil, or other, but a special law appropriated to this kingdome, and most accommodate and apt for the good government thereof, under which it hath wonderfully flourished, when this law hath been put in due execution: and therefore as by situation, so by law it is truly said,

* Di-
visos } orbe &
 } legibus.

*Et penitus toto * divisos orbe Britannos.*

(1) *If any man.*] Though these words be generall, yet they extend not to ecclesiasticall persons, because there is speciall provision for them after in the act.

(2) *Any summons, sentence, or excommunication.*] Hereby are prohibited the popes buls of any sentence or excommunication, &c. and proces of summons.

It appeareth by our books that the bringing of any bull of excommunication into the realme against a subject, was against the common law of England, in respect it gave way to foraine authority. And so it was holden in the time of E. 1. and E. 3. &c. long before this act, and ever since.

(3) *Or execution of the said statute of provisors.*] viz. 25 E. 3. *de provisoribus*. See 25 E. 3. cap. 22. 27 E. 3. cap. 1. 38 E. 3. stat. 2. cap. 1. & 4.

(4) *Incurre the paine of life and member.*] ^a That is, of felony as hath been often said before. This punishment is altered by the statute of 13 Eliz. cap. 2. as hereafter in this chapter shall appeare.

(5) *And if any prelate make execution, &c.*] This and the next following branch extend to ecclesiasticall persons. The punishment in both these branches, and in the former also is altered by the statute of 13 Eliz. cap. 2. For thereby this offence is made high treason,

[101]

11 E. 3. Cer-
tif. 6. 30 Aff.
p. 3. 19 E. 3.
Quare non ad-
missit. 7. Brook.
Premunire 10.
11 H. 4. 69. 76.
14 H. 4. 14.
7 E. 4. 14.
20 H. 6. 1.
35 H. 6. 42.
F. N. B. 64. f.
Lib. 5. fo. 12.
in Caudries case.
^a W. 2. cap. 24.
1 E. 2. de frang.
prisonam.
28 E. 3. cap. 3.
13 R. 2. stat. 2.
ca. 3. 9 E. 4. 26.
Bl. Cor. 203.

son, ^b as well in persons ecclesiasticall, as temporall: which act, and the cause of the making thereof you may reade in the case *de jure regis ecclesiastico, ubi supra.*

^b Lib. 5. f. 35, 36, &c. De jure regis eccles.

C A P. XXXVII.

Of Felony in receiving a Jesuite, Seminary Priest, &c.

EVERY person which shall wittingly and willingly receive, relieve, comfort, or maintaine any jesuite, seminary priest, or other priest, deacon, or religious, or ecclesiasticall person (made by authority from the see of Rome since the feast of Saint John Baptist, an. 1 Eliz. borne within this realme) being at liberty and out of hold, knowing him to be a jesuite, &c. shall for such offence be adjudged a felon without benefit of clergie.

27 Eliz. cap. 2.

Clergie taken away.

The cause of the making of this statute of 27 Eliz. against jesuites and seminary priests, &c. and their receivers, you may reade at large, lib. 5. fol. 38, 39, in the case *De jure regis ecclesiastico.*

C A P. XXXVIII.

[102]

Of Felony in Recusants concerning Abjuration.

IF any recusant) other then a Popish recusant or a feme covert) which by the tenor and intent of this act is to be abjured, shall refuse to make abjuration, or after such abjuration made shall not goe to such haven, and within such time, as is by this act appointed, and from thence depart out of the realme, according to this present act, or after his departure shall returne into any of her majesties realmes or dominions, without her majesties special license in that behalfe first obtained; that then every such person so offending, shall be adjudged a felon.

35 Eliz. cap. 1.

If any offender against this act before he or they be required to make abjuration, repaire to some parish church, on some Sunday or festivall day, and then and there heare divine service, and make such submission as by the act is prescribed: then the said offender is cleerly to be discharged.

The offender shall forfeit his goods and chattels, and his lands during his life only, the offence shall work no losse of dower or corruption of blood, and the heire to inherit. The offender shall not have the benefit of his clergie.

C A P. XXXIX.

Of Felonie in Egyptians, &c.

1 & 2 Ph. and
Mar. cap. 4.
5 Eliz. cap. 20.

IF any outlandish people, calling themselves, or being called Egyptians, shall remaine in this realme, or in Wales, one moneth, at one or severall times: and if any person being fourteene yeares old, which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herselfe like to them, shall remaine here or in Wales by the space of one moneth, either at one or severall times, it is felony.

The offender shall not have the benefit of his clergie.

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C A P. XL.

Of Felonie in dangerous Rogues.

39 Eliz. cap. 4.
1 Jac. cap. 7, 25.

IF any dangerous rogue that was banished the realme or adjudged perpetually to the gallies, have returned into the realme without lawfull license or warrant, it is felony: the felony to be tried where the offender is apprehended.

The offender may have the benefit of his clergie.

39 Eliz. cap. 4.
1 Jac. cap. 7.

If any rogue after he hath been branded in open sessions with a Roman R. upon the left shoulder, or sent to the place of his dwelling where he last dwelt by the space of a yeare, or the place of his birth, to be placed in labour, have offended againe in begging, or wandering contrary to the said statutes, it is felony, to be tried in the county where the offender shall be taken.

The offender against this branch shall not have the benefit of his clergie.

Deut. ca. 15. v.
4. Mirr. cap. 1.
§ 3. Inter les Art.
per viels royes
ordeins.

*Mendicus non erit inter vos, there shall be no begger among you.
Ordeine fuit que les pobres fussent susteinus per les parsons, rectoris,
et les parochians cy que nul ne morust per default de susteinance.*

See

See an ancient ordinance in 50 E. 3. concerning ribauds and sturdy beggars, that they be driven to their occupations or services, or to the place from whence they came. Rot. Par. 50 E. 3. nu. 61. Brit. 49. b.

C A P. XLI.

Of Felonie by Forgerie in the second Degree.

IF any person or persons being once condemned of any of the forgeries mentioned in the act, shall after such his, or their condemnation, eft-soones commit or perpetrate any of the said offences in forme in the said act mentioned, that then every such second offence shall be adjudged felony. But no attainder of this felony shall extend to take away dower, nor to corruption of blood, or disherison of the heire. 5 Eliz. cap. 14.

In 43 Eliz. Markham was attainted of felony upon this branch in the kings bench for a second forgery of many of the mannors and lands late of Sir Thomas Gresham knight, and was executed therefore. Markhams case coram rege. 43 Eliz.

* This felony is to be heard and determined before justices of oier and terminer, and justices of assise in their circuit. And albeit that justices of peace have power to heare and determine felonies, trespassse, &c. yet are they not included under the name of justices of oier and terminer: for justices of oier and terminer are known by one distinct name, and justices of peace by another. But the justices of the kings bench are justices of oier and terminer within this statute. Hil. 30 Eliz. coram rege. Lib. 9. fo. 118. b. Smiths case. 3 Mar. Br. tit. Oier & Term. 8.

The offender shall not have the benefit of his clergie.

See hereafter in the exposition of this statute for the first offence, where incidently there shall be more said concerning the second offence.

C A P. XLII.

Of Felony for conveying of any Sheep alive out of the Realm in a second Degree.

NO manner of person shall bring, deliver, send, receive, or take, or procure to be brought, delivered, sent, or received into any ship, or bottome any rams, sheep, or lambs, or any other sheep alive, to be carried and conveyed out of this realm of England, Wales, or Ireland, or out of any of the queens dominions, upon pain that every such person, their aiders, abettors, procurers, and comforters, shall for his 8 El. cap. 3. See the statute of 3 H. 6. cap. 2.

His left hand
cut off.

his and their first offence, forfeit all his goods, and suffer imprisonment one whole year without bayl or mainprise; and at the years end in some market town in the fulnesse of the market, have his left hand cut off, &c. And that every person est-soons offending against this statute shall be adjudged a felon, &c.

But this act shall not extend to any corruption of blood, or losse of dower. This felony is to be heard and determined before justices of oier and terminer, justices of gaol-delivery, and justices of peace. And the offender may have the benefit of his clergy, as well in case of the cutting off his hand as in case of felony. See Stanford, 37. b.

C A P. XLIII.

Of Felony in Servants that imbefill their Masters Goods after their Decease.

33 H. 6. cap. 1.

^a This extends to the lord keeper of the great seal.

^b This extends to the administrators, and also, if there be but one executor or administrator.

^c Attainted by force of this act of parliament upon default. See the like many times in the parliament rolls. Rot. Parl. 15 H. 6. nu. 14. & 15. Rot. Parl. 18 H. 6. num. 28.

IF any of the household servants of any person shall after the decease of their lord or master violently and riotously take and spoil the goods which were their said lords or masters, and the same distribute amongst them, that upon full information ^a to the chancelour of England for the time being by the ^b executors or two of them, of such riot, taking, or spoil made, the chancelour by the advice of the chief justices, and chief baron, or two of them, shall have power to make so many and such writs to be directed to such sheriffs, as to them shall seem necessary, to make open proclamation in such sort, as by the act is prescribed, to appear in the kings bench, &c. and if any such writ be returned, &c. then if the said person or persons make default, then he or they making default shall be ^c attainted of felony.

The offenders shall have the benefit of their clergy.

C A P. XLIV.

Of Felony in Servants that imbefill their Masters Goods committed to their Trust above Forty Shillings.

EVERY servant to whom any caskets, jewels, money, goods, or cattels of his or their master, or mistress, shall be delivered to keep, that if any such servant or servants withdraw him or them from their said masters or mistresses (1), and goe away with the said caskets, jewels, money, goods, or cattels, or any part thereof to the intent to steal the same, contrary to the trust and confidence in him or them put, &c. Or else being in service of his said master or mistress, without the assent and commandment of his master or mistress, imbefill the same or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it: if the caskets, jewels, money, goods or cattels be of the value of forty shillings or above, shall be deemed and adjudged felony.

21 H. 8. ca. 7.
27 H. 8. ca. 17.
28 H. 8. ca. 2.
1 E. 6. ca. 12.
5 El. ca. 10.

Concerning the value, (to speak it once for all) *tantum bona valent, quantum vendi possunt.*

This act extendeth not to any apprentice or apprentices, nor to any servant within the age of eighteen years, at the time of the offence committed.

Vide Dier, 25 H. 8. fol. 5.

By the statute of 27 H. 8. the offender was ousted of his clergy, but that act is repealed by 1 E. 6. cap. 12. So as at this day the offender may have the benefit of his clergy.

Dier, 25 H. 8.
f. 5.
1 E. 6. ca. 12.

(1) *Shall be delivered by his or their master or mistress.*] If the master deliver an obligation to his servant to receive the money thereby due, and the servant receive the money of the obligee, and goeth away with the same with intent to steal the same, this is no offence within this statute, because he had not the money of the delivery of his master: and if he had gone with the obligation with intent, *ut supra*, it had been also out of this act, because it was a chose in action. So if the master deliver to his servant wares or merchandises to sell, and selleth the same and goeth away with the money as before, this is no offence within this statute for the cause aforesaid. See Stanford, 37. b.

Dier, 26 H. 8.
fo. 5. a. & b.
See the form of
the indictment
upon this stat.
Lamb. inter Prae-
sidentes.

C A P. XLV.

Of Felony to cut down or break up the Powdike in Marshland in Norff.

22 H. 8. ca. 11.
2 & 3 Ph. and
Mar. cap. 19.

EVERY perverse and malicious cutting down and breaking up of any part of the new dike called the Powdike in Marshland in the county of Norff. or of the broken dike called Oldfield Dike by Marshland in the Isle of Ely in the county of Cambridge, or of any other bank being parcell of the Rinde, and uttermost part of the said country is adjudged felony.

The justices of peace have power to enquire of, and to hear and determine this felony. The offender may have the benefit of his clergy.

Some say that this is a private act, but it is *publicum in privato*, for the danger is publike though the place be private, and doth concern multitudes of people, and the sea is such an immense creature, as who can withstand it without length of time, infinite dammage, and losse, and extream charge and cost.

43 El. cap. 13.
* See before
cap. 12. fo. 61,
62. 3 H. 7. cap.
2. Vide 1 Fl. 5.
c. 6. simile de
Gales.

* Blackmail is
explained by the
act it self.

See the statute of 43 El. cap. 13. whereby in the counties of Cumberland, Northumberland, Westmerland and the B. of Duresme * carrying away or detaining of any person against his will, or imprisoning him or them to ransom them or to spoil them, upon deadly feud or otherwise, or shall receive or carry * blackmail, or give black mail for protection, &c. is made felony without benefit of clergy.

C A P. XLVI.

Of one of the Grand Enquest being one of the Indictors of any Person or Persons of Treason or Felony, and discover openly what Persons were so indicted, &c.

Stanf. fo. 36. a.

THIS by some opinion in our books was holden for treason, or felony, and hereof divers reasons were yeelded.

First, that such discovery was against his oath, but that could not be the reason, for perjury was neither treason nor felony.

Secondly, others did hold, that by this discovery the parties indicted of treason or felony might flee, or escape, but that can be no reason;

reason; for this discovery without more, can neither make him principall nor accessory.

Thirdly, others that endeavour to confesse and avoid the authorities in this case in law, are of opinion, that in those times the intent of a man, *in criminalibus*, was much respected, in as much as *in criminalibus voluntas reputabatur pro facto*, and that by this open discovery, &c. his intent appeared, that they might flee or escape. And now it is agreed on all parts, that at this day such discovery is neither treason nor felony: and the rather, for that no person ever died for such discovery. In Georges case, in *anno* 27 lib. Ass. upon his indictment he was acquitted. But certaine it is, that such discovery is accompanied with perjury, and a great misprision to be punished by fine and imprisonment.

18 E. 3. Cor.
272. 27 Ass.
p. 63. Georges
case.

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C A P. XLVII.

Of Larceny or Theft by the Common Law.

HAVING thus far proceeded, we are now come to larceny, which commeth from *latrocinium*, and from *latrocinie*, by contraction, or rather abuse, to larceny.

The Mirror first describeth larceny, and then explaineth it. *Larcenie est prise d'autre moeble corporelle trecherousment contre la volunt de celui a q. il est p. male egaigne de la possession, ou del use.* Then doth he explaine and shew the reason of the principall words thereof.

Mirror, cap. 2.
§ 10. De Larcenie.

Prise est dit, car baile nest my tittle de laroun, ne livery en le case.

Moeble corporelle est dit pur ceo q. en biens nient moebles, ou nient corporels, sicome de tre', rents, et des advowsons de esglises, ne se fait nul larcenie.

Trecherousment est dit pur ceo q. si lesloignour entende les biens estre siens, et que il les poet bien prender, en tiel case ne se fait my ceste peche, nec en case ou len prent l'autrui p. la ou len entend, que il pleist al seignour des biens, que il les prendera, mes a ceo covient enseigner apparant presumption et evidence.

Et sciendum, quod furtum est, secundum leges, contrectatio rei alienae fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerat.

Bracton, lib. 3.
fol. 150.

And then he also explaineth it. *Cum animo dico, quia sine animo furandi non committitur.* Bracton useth not the word *latrocinium*, but *furtum*, and so doth Granville. See Britton a whole chapter *de Larcyns*. And Fleta hath it thus, *Est autem furtum contrectatio rei alienae fraudulenta cum animo furandi invito dno. cujus res illa fuerit*, following Bracton *totidem verbis*. These descriptions are generally of theft, comprehending robbery, burglary, when any thing is taken, and all other latrocines. But here larceny for distinction sake is taken in a narrower sense, viz. for single theft or thievery, and may be described thus.

Glanvil. lib. 7.
c. 17. & lib. 10.
cap. 15. Britton,
cap. 15. de Larcyns. fo. 22.
Fleta, lib. 1.
ca. 36.

Larceny, by the common law, is the felonious and fraudulent taking and carrying away by any man or woman, of the meere personall goods of another, neither from the person, nor by night in the house of the owner.

Larcenie defined.

Now

See tit. Piracy,
&c.
Butlers case,
28 Eliz.

2 E. 3. 1.

Glanvil. lib. 10.
cap. 13.
13 E. 4. 9.

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Charge.

3 H. 7. 12.
21 H. 7. 15.

13 E. 4. 9.

Speciall use.

22 Aff. pl. 99.
22 E. 3. cor.
265.

See cap. de
Treason. Verb.
quant. home,
&c.
Et cap. Murder.
27 Aff. 40.
2 E. 3. cor. 160.
Lex Inæ cap. 50.
accord.
Stanf. 26. c.
15 E. 2.
Cor. 383.
Mic. 37 E. 3.
coram rege. Rot.
83 Lincoln.

Now let us peruse the principall parts of this description.

Felonious taking.] First it must be felonious, *id est, cum animo furandi*, as hath been said. *Actus non facit reum, nisi mens sit rea.* And this intent to steale must be when it cometh to his hands or possessions: for if he hath the possession of it once lawfully, though he hath *animum furandi* afterward, and carrieth it away, it is no larceny: but this receiveth some distinction, as hereafter shall appeare.

Secondly, it must be an actuall taking: for an indictment, *quod felonice abduxit equum*, is not good, because it wanteth, *cepit*. By taking, and not bailment or delivery, for that is a receipt, and not a taking: and therewith agreeth Glanvil. *Furtum non est ubi initium habet detentionis per dominum rei.*

But herein the law doth distinguish. For if a bale or pack of merchandize be delivered to carry to one to a certaine place, and he goeth away with the whole pack, this is no felony: but if he open the pack, and take any thing out *animo furandi*, this is larceny. Likewise if the carrier carry it to the place appointed, and after take the whole pack *animo furandi*, this is larceny also: for the delivery had taken his effect, and the privity of the bailment is determined. And so it is of a tun of wine, or the like, *mutatis mutandis*.

Also there is a diversity betweene a possession, and a charge; for when I deliver goods to a man, he hath the possession of the goods, and may have an action of trespassse, or an appeale, if they be taken or stolne out of his possession. But my butler or cook, that in my house hath charge of my vessel or plate, hath no possession of them, nor shall have an action of trespassse or an appeale, as the bailee shall: and therefore if they steale the plate or vessel, it is larceny. And so it is of a shepherd, for these things be *in onere, et non in possessione promi, coci, pastoris, &c.*

If a taverner set a piece of plate before a man to drink in it, and he carry it away, &c. this is larceny: for it is no bailment, but a speciall use to a speciall purpose.

Thirdly, nor by trover or finding. If one lose his goods, and another finde them, though he convert them, *animo furandi*, to his own use, yet is it no larceny, for the first taking is lawfull. So if one finde treasure trove, or waife, or stray, and convert them *ut supra*, it is no larceny, both in respect of the finding, and also for that *dominus rerum non apparet*.

Felonious implyeth, that though the taking be actuall, yet must it be done by such persons as may commit felony. A mad man that is *non compos mentis*, or an infant that is under the age of discretion, cannot commit larceny, as in another place we have said.

A feme covert committeth not larceny, if it be done by the coercion of her husband: but a feme covert may commit larceny, if she doth it without the coercion of her husband: and there it appeareth, that a man may be accessary to his wife, but the wife cannot be accessary to her husband, though she know that he committed larceny, and relieve him, and discover it not: for by the law divine, she is not bound to discover the offence of her husband.

Felons came to the house of Richard Dey, and Margery his wife; the wife knew them to be felons, but the husband did not, and both of them received them, and entertained them, but the wife consented not to the felony. And it was adjudged, that this made not the wife accessary, *Quia ipsa in vita mariti sui de aliquo receptamento*

ceptamento in præsentia viri sui, cui contradicere non potuit, occasionari non debet.

Uxor furi desponsata non tenebitur ex facto viri, quia virum accusare non debet, nec detegere furtum suum, nec feloniam, cum ipsa sui potestatem non habet, sed vir.

Braeton, lib. 3.
fol. 151. b.

La feme nequedent al felon poit dire q. tout scavoit ele del mauvasse son baron, pur ceo ne le poet ele my encuser, ne devoit, tant come ele fuit de luy covert, &c.

Briton. cap. 24.
fo. 47.

Uxor autem furis non teneatur pro delicto viri, pœna enim suos debet tenere authores, uxor autem virum accusare non debet, nec felonice suæ consentire, &c.

Fleta, lib. 1.
ca. 36.

Felonious and fraudulent taking.] If a man seeing the horse of B. in his pasture, and having a minde to steale him commeth to the sheriffe, and pretending the horse to be his, obtaineth the horse to be delivered unto him by a replevyn, yet this is a felonious and fraudulent taking, as it was resolved by the judges, as Catlin chiefe justice reported in the kings bench, Pasch. 15 Eliz. for the Replevyn was obtained *in fraudem legis*.

Pasch. 15 Eliz.
Vide statutum.

Carrying away.] For the indictment saith, *felonice cepit et asportavit*. The removing of the things taken, though he carry not them quite away, satisfieth this word *asportavit*. As if a guest take the coverlet or sheets of his bed, and rising before day, take the coverlet or sheets out of the chamber, where he lay, into the hall, to the intent to steal them, and went to the stable to fetch his horse, and the ostler apprehended him, and this was adjudged larceny: and the coverlet or sheets were carried away being removed from the chamber to the hall, albeit they were still in the house of the owner.

22 Aff. pl. 39.

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So if a mans horse be in his close, and one taketh him, and as he is carrying him away, he is apprehended, before he getteth out of the close, yet this is sufficient to make it larceny.

Justice Dalizons
Report.

Of mere personall goods.] It is said (mere) for though they be personall goods, yet if they savour any thing of the realty, no larceny can be committed of them; as any kind of corn or grain growing upon the ground is a personall chattell, and the executors of the owner shall have them, though they be not severed, but yet no larceny can be committed of them, because they are annexed to the realty. So it is of grasse standing on the ground, or of apples, or any other fruits upon trees, or bushes, or of woods growing; but if the owner cut the grasse, or gather the fruit, or cut the wood, then larceny may be committed of them.

12 E. 3. Cor.
199. 22 E. 3.
Ibid. 256.
lib. 4. fo. 19.

So it is of a box or chest with charters, no larceny can be committed of them, because the charters concern the realty, and the box or chest though it be of great value, yet shall it be of the same nature the charters be of: *et omne majus dignum trahit ad se minus*.

10 E. 4. 14.
lib. 8. fo. 33. b.
Caleys case.

No larceny can be committed by taking, and carrying away of a ward, or of a villain, because they are in the realty.

It appeareth by all our ancient authors *ubi supra*, and by the statute of W. 1. that there is grand larceny, and petit larceny, distinguished so by the value: for if the personall goods stoln amount to above the value of twelve pence, then is it grand larceny, and if it be under the value of twelve pence, then it is petit larceny, for

which

W. 1. ca. 15.
See the exposition thereof.
27 H. 8. 22.
Coriū foris facere or perdere
Sax. tholiz, his hide is to be

whipt. Mirror
ca. 4. §. De
crime de rob-
bery.

Lib. 7. fo. 18.
In case de Swans.

^a Vide verb (of
another) next
following.

12 H. 8. 39.

14 H. 8. 3. 4.

18 H. 8. 2.

2 E. 2. distres

20 leveret. 2 E. 2.

Avowry. 182.

ferret. 38 E. 3.

10. 47 E. 3. 10.

5 H. 5. 1.

9 H. 6. 2.

F. N. B. 87. a.

and 88. I. 86. 1.

^b Mirror c. 1.

§ 10. Dier 14 El.

306, 307. 18 E.

4. 8. 16 E. 4. 11.

14 H. 8. 4.

Vide before.

37 E. 3. fo. 37.

F. N. B. 86. 1.

^c 18 H. 8. 2. b.

Doct. & Stu. 9.

b. Britton, 74.

75. Braet. 1. 2.

fo. 9. 8 E. 4. 5.

^d 11 H. 7. ca. 17.

31 H. 8. ca. 12.

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^a Stanf. 25. c.

12 E. 4. 4.

18 E. 4. 8.

22 H. 6. 59.

43 E. 3. 24.

Vide before,

verb. (Of meer

personall goods)

3 H. 6. 55.

lib. 5. fo. 104. b.

lib. 7. fo. 16, 17.

^b 10 E. 4. 14.

7 E. 4. 14.

Stanf. 25.

which he shall forfeit all his goods, and suffer some corporall punishment, as whipping, &c.

And this was the ancient law before the conquest, for the Mirror saith, *Et tout soit que la ley ne eyt regard forsque al ceures des peuchers nequident linit le quantitie del robbery et larceny en cest manner, cestassavoir que nul ad judgement de la mort, si non larceny, &c. ne passent 12 deniers de sterlings.*

A man hath a mere property in some things that are tame by nature, and yet in respect of the baseness of their nature, a man shall not commit any larceny, great or small, though he steal them, as of mastifs, bloud-hounds, or of other kind, dogs or of cats, nor of some things that be ^a wild by nature, and made tame, as bears, foxes, apes, monkies, polcats, ferrets, and the like, and yet no manner of felony can be committed on them, in respect of their wild and savage nature, and therefore no person shall die for them: and likewise it is of their whelps, or calves, or young; for it is a rule in law, that if no felony can be committed of any thing that is *ferum natura*, and of age being reclaimed, or made tame, that no felony can be of the young in the nest, kennell or den.

^b So as a man may have property in many things, and yet in respect of their nature there can be no felony of them. On the other side, of some things that be *feræ natura*, being reclaimed, felony may be committed in respect of their noble and generous nature and courage, serving *ob vitæ solatium* of princes, and of noble, and generous persons, to make them fitter for great employments: As all kind of faulcons, and other hawks, if the party, that steals them know they be reclaimed.

Of another.] ^c No larceny can be committed of wild beasts, or of fowls that be wild, or of fishes that be at their naturall liberty in rivers, or great waters, because these be *nullius in bonis*: but larceny may be committed of young pigeons in dovehouses, or of young hawks in the nest. But if any person upon the ground of any other, doe take the eggs of any faulcon, goshawk, lanner, or swan out of the nest, this is not felony, ^d but he shall be imprisoned by the space of a year and a day, and fined at the kings will, the one half to the king, and the other to the owner of the ground. But larceny may be committed of the eggs of such as be *domitæ natura*, as of hens, turkies, pehens, and the like. ^a And larceny may be committed of fishes in a trunk or pond, because they are not at their naturall liberty, but as it were beasts in a pownd.

^b But if such as be wild, that serve for the food of man, be made tame, as deer, wild bore, conies, cranes, pheasant, partridge, or the like, larceny may be committed of them, so as he that stealeth them know that they be tame. But the deer, &c. being wild, yet when he is killed larceny may be committed of the flesh, and so of pheasant, partridge, or the like: and so note a diversity between such beasts as be *feræ natura*, and being made tame, serve for pleasure only, and such as be made tame and serve for food, &c. which diversity being not observed, hath made many men to erre.

A man may be indicted, *Quare bona capellæ in custodia, &c.* and so in time of vacation, *bona domus ecclesiæ.*

At

At the assises at Leicester, in Lent, *anno* 10 Jac. the case was this, one William Hain had in the night digged up the graves of divers severall men, and of one woman, and took the winding sheets from the bodies, and buried the bodies again: and I advising hereupon for the rarenesse of the case, consulted with the judges at Serjeants Inne in Fleetstreet; where we all resolved, that the property of the sheets was in the executors, administrators or other owner of them, for the dead body is not capable of any property, and the property of the sheets must be in some body: and according to this resolution, he was indicted of felony at the next assises, but the jury found it but petit larceny, for which he was whipped, as he well deserved.

10 Jac. regis.
Hains case.
Furtum inauditu-
tum.

Nota. A felonious taking must be of the possession, and not of the property removed from the possession.

If a man doth bail, or lend his goods to another, although he hath the generall property of them, yet may he commit larceny of them, by the felonious taking and carrying them away, and in judgement of law he is said in this case to take the goods of another: for the bailer hath *jus proprietatis*, and the bailee hath *jus possessionis*, or a speciall property.

7 H. 6. 43.

The wife cannot steal the goods of her husband, for they be not the goods of another, for the husband and wife are one person in law, *duæ animæ in carne una*.

21 H. 6. Cor.
455. Abbridge
dass 63.

Vide Stanf. Pl. Coron. fo. 24, 25.

To speak it here once for all, if any person be indicted of treason, or of felony, or larceny, and plead not guilty, and thereupon a jury is returned, and sworn, their verdict must be heard, and they cannot be discharged, neither can the jurors in those cases give a privy verdict, but ought to give their verdict openly in court.

Macegriefs, fleshmongers, such as buy and sell stollen flesh, knowing the same to be stollen. Vide *Lamb. inter leges Edw. regis* fol. 140. b. *De Machecariis* derived of *mace* an old word for flesh, and *grief*, wrong or injury.

Britton, fo. 71.

C A P. XLVIII.

[III]

De Anno Die et Vasto.

Of the Year Day and Waft.

HEREOF we have treated at large, in the second part of the Institutes in his proper place upon the exposition of Magna Carta, cap. 22. where it appeareth, that at this day the king shall have but the profits for a year and a day in lieu and satisfaction of the waft which the common law gave to the king in despite and detestation of the offence, as there you may read at large: and there it appeareth how necessary it is, ancient authors to be read, all which need not here to be rehearsed: * and

Mirror, cap. 1.
§. 3. and cap. 4.
§. *Et le roy in remembrance, &c.*
Lege quia optime, Glanv. li. 7. cap. 17.
Bracton, lib. 3. fo. 129. 137.
Britton, c. 5. Regist. 165.

f. 14. Fleta, lib. 1. c. 28, § *Causa vero*, &c. 17 E. 2. Præf. Regis cap. ultimo. Mag. Cart. cap. 22. 3 E. 3. Cor. 356. 377. 310. 290. * 42 E. 3. ca. 1.

III, INST,

K

that

that if any statute be made to the contrary of Magna Carta, it shall be holden for none. And therefore if *prærogativa regis anno 17 E. 2. cap. ultimo*, be contrary thereunto, it is repealed as to the wast.

C A P. XLIX.

Of Piracy, Felonies, Robberies, Murders, and Confederacies committed in or upon the Sea, &c.

HAVING now treated of felonies, &c. that are committed and done upon the land, we will consider of piracies, and felonies, &c. done on the sea, which by an act of parliament are to be enquired of, heard, and determined according to the course of the common law, as if they had been done upon the land.

Rot. Parl.
8 H. 6. nu. 42.

28 H. 8. ca. 15.

Vid. 27 E. 3.
c. 13. del staple.
31 H. 6. cap. 4.
Vide 2 R. 3.
fo. 2. Vide Pal-
laches case.

All treasons (2), felonies, robberies, murders and confederacies committed in or upon the sea, or in any other haven, river, creek, or place, where the admirall hath, or pretends to have power, authority, or jurisdiction (3), shall be enquired, tried, heard, determined, and judged in such shires, and places in the realm, as shall be limited by the kings commission under the great seal in like form and condition, as if any such offence had been committed upon the land (5), to be directed to the lord admirall, or to his lieutenant, deputy, or deputies, and to three or four such other substantiall persons, as shall be named by the lord chancellor of England (4), for the time being, &c.

See before in the
chap. of Heresy.

And such as shall be convict of any such offence by verdict, confession, or proces by authority of any such commission, shall have and suffer such pains of death, losses of lands, goods and chattels, as if they had been attainted of any treason, felony, robbery, or other the said offences done upon the land.

The offenders not to be admitted to have the benefit of clergy.

[112]

See 40 Ass.
pl. 25.

The mischief before this statute was (as it appeareth by the preamble) that traitors, pirates (1), thieves, robbers, murderers, and confederators upon the sea many times escaped unpunished, because the common law of this realm extended not to these offences, but were judged, and determined before the admirall, &c. after the course of the civill laws, the nature whereof is, that before any judgement of death be given against the offenders, either they must plainly confesse their offences (which they never will do without torture or pains)

or

or by * witnesse indifferent, such as saw their offences committed, &c. which in these cases cannot be gotten but by chance, or very rarely: for this cause, the commons petitioned in a parliament in 8 H. 6. that the justices of peace might enquire of all piracies: but the kings answer was, That he would be advised.

This statute requires a confederate and just interpretation, wherein, for that it concerneth the life of man, the safest way is, to follow the resolutions of all the judges formerly had upon due consideration of all the parts of this act, and upon divers conferences, and in the end, when I was attorney generall, resolved by them unanimously as followeth:

Where divers did in the reign of the late queen Elizabeth commit piracy and robbery upon the high sea, of divers merchants of Venice, in amity with the said queen, and after the 'pirats, being not known, obtained a pardon, granted at the coronation of king James, whereby the king pardoned them all felonies (*inter alia*) First, that before this statute piracy, or robbery on the high sea was no felony, whereof the common law took any knowledge, for that it could not be tried, being out of all towns and counties, but was only punishable by the civill law, as by the preamble it appeareth; the attainder by which law wrought no forfeiture of lands, or corruption of blood. Secondly, that this statute did not alter the offence, or make the offence felony, but leaveth the offence as it was before this act, viz. felony only by the civil law, but giveth a mean of triall by the common law, and inflicteth such pains of death, as if they had been attainted of any felony, &c. done upon the land. But yet (as hath been said) the offence is not altered, for in the indictment upon this statute, the offence must be alledged upon the sea; so as this act inflicteth punishment for that, which is a felony by the civill law, and no felony, whereof the common law taketh knowledge. Thirdly, although the king may pardon this offence, yet being no felony in the eye of the law of the realm, but only by the civill law, the pardon of all felonies generally extendeth not to it, for this is a speciall offence, and ought to be specially mentioned.

Upon this resolution these consequents do follow. 1. That by the attainder upon this act, though there be forfeiture of lands, and goods, yet there is no corruption of blood. 2. Seeing the offence is not made felony by the laws of this realm, there can be no accessory of any felony by the laws of the realm in this case, either before or after the offence, because the principall is no felon by our law, neither doth this act speak of any accessory. 3. If there be an accessory upon the sea to a piracy, that accessory may be punished by the civill law before the lord admirall, but cannot be punished by this act, because it extendeth not to accessories, nor makes the offence felony. * Lastly, the statute of 35 H. 8. ca. 2. taketh not away this statute for treasons done upon the sea for the cause aforesaid. Which resolution I have thought good to report, because it openeth the windows of this statute.

In Trin. 18 Eliz. in lord Diers manuscript, there is a quære made, what offence it is to lodge and entertain upon the land a pirat, knowing him to be a pirat, and whether this accessory upon the land shall be tried by this statute, which is only of principalls in piracy. And it was thought by the two chief justices, that the surest way, was to have the commission in the county where the

* Concerning treason, see before cap. 2. verb. *All trials.* fo. 25. 1 E. 6. ca. 12. 5 E. 6. ca. 11. &c.

a Rot. Par. 8 H. 6. nu. 42. Hil. 2. Ja. regis, at Serjeants Inne in Fleetstreet, the resolution of the justices.

Three points resolved.

Vide similia. 19 E. 3. Cor. 124. 8 H. 4. 2. 9 E. 4. 28.

* See the fourth part of the Institutes, cap. High Treason. 5 El. cap. 5. Vide supra, cap. High Treason. Verbo *On per ailers*, f. 11.

2 & 3 E. 6.
ca. 24.

Vid. lib. 2. fo.
93. Bingham's
case. See the
lord Sancars
case, lib. 9. 117,
118.

Anno 28 Eliz.
Butlers case.

accessory offended, and there both the principall and the accessory may be indicted, and tried, *ut per statutum, anno 5 & 6 E. 6. quære. Hæc * ille.* So as this quære is now cleared by the resolution of the judges: and questionlesse the statute (intended of 2 & 3 E. 6. for there is none such in 5 & 6 E. 6.) extendeth only, when a murder or felony is committed in one countie, and another person is accessorie in another countie (as hath been said before:) but in that case the offence was committed upon the sea, and not in any countie, and so out of that statute: and therefore this part of the manuscript of the lord Dier was not thought fit to be printed.

Butler and other pirats in summer vacation robbed divers of her majesties subjects, upon the coast of Northfolk, upon the high sea; and brought divers of the goods so taken into the county of Northfolke, and there were apprehended with the goods: The question moved to Wray chiefe justice, and justice Peryam, justices of assise in Northfolk, was, whether they might be indicted of felony in Northfolk, as if one steale goods in one county and carry them into another county, he may be indicted in either county? and it was resolved by them, that they could not be indicted for felony in Northfolk; because the originall taking was no felony, whereof the common law took conuſance, because it was done upon the sea, out of the reach of the common law: and therefore not like the case, where one stealeth in one county and carrieth the goods into another, for there the originall act was felony whereof the law took conuſance.

But now let us peruse the words of the statute.

(1) *Where traytors, pirats.*] This word pirat, in Latine *pirata*, is derived from the Greek word *πειράτης*, which againe is fetched from *πειράω*, *à transeundo mare*, of roving upon the sea: and therefore in English, a pirat is called a rover and a robber upon the sea.

(2) *Treason, &c.*] Note, treason done out of the realme, is declared to be treason by the statute of 25 E. 3. and yet at the making of this act of 28 H. 8. it wanted triall, (as by the preamble of this statute it is rehearsed) at the common law. And therefore to establish a certainty therein, the statute of 35 H. 8. was made, as is aforesaid in the exposition of the statute of 25 E. 3. See Pasch. 43 Eliz. lib. 5. fo. 107. Sir Henry Constables case.

25 E. 3. cap. 1.
40 Ast. p. 25.

Before the statute of 25 E. 3. if a subject had committed piracie upon another (for so is the book to be intended upon a fact done before 25 E. 3.) this was holden to be petit treason, for which he was to be drawne and hanged: because *pirata est hostis humani generis*, and it was *contra ligeancie sue debitum*: but if an alien, as one of the Normans, who had revolted in the reigne of king John, had committed piracy upon a subject, this offence could be no treason, for though he were *hostis humani generis*, yet the crime was not *contra ligeancie sue debitum*, because the offender was no subject, but since the statute of 25 E. 3. this is no treason in the case of a subject.

(3) *Upon the sea, or in any other haven, river, creek, or other place, where the admirall hath, or pretends to have power, authority, or jurisdiction.*] These words [or pretends to have, &c.] are thus to be understood, between the high-water-mark, and the low-water-mark: for though the land be *infra corpus comitatus*, at the reflow; yet

yet when the sea is full, the admirall hath jurisdiction *super aquam* as long as the sea flowes: so as of one place there is *divisum imperium* at severall times: but extend not to any haven, river, creek, or other place, that is *infra corpus comitatus*: for offences there committed were triable by the common law, and out of the mischief and purvien of this statute: for in the preamble, the sea is only mentioned, and in the body of the act it is said, in like forme and condition, as if any such offence had been committed upon the land.

(4) *As shall be named by the lord chancellor of England.*] A nomination by the lord keeper of the great seale of England was taken to be * within this act by the greater opinion of the justices: but the statute of 5 Eliz. hath made a declaration of the common law concerning the power and authority of the lord keeper of the great seale, which hath cleared that, and all other like questions.

(5) *To heare and determine such offences after the common course of the lawes of this land used for treasons, felonies, &c. done and committed upon the land.*] If the offender upon his arraignment before commissioners by force of this statute stand mute, he shall have judgement *de peyne fort et dure*, by force of this generall branch, but it is out of the latter words of the act, viz. and such as shall be convicted of any such offence by verdict, confession, or proces. For he that standeth mute is not convicted of the offence, but suffereth for his contumacy. Also it is neither by verdict, confession, or proces.

For *peine fort et dure*: see in the second part of the Institutes, in the exposition upon the statute of W. 1. cap. 12.

C A P. L.

O F C L E R G I E.

WHAT person shall have his clergie, for what offences, in what suits, who is judge thereof, and at what time clergie is to be demanded, you may reade at large in Alexander Poulterers case in the eleventh part of my reports: where also is resolved the diversity betweene a clerk convicted, and a clerk attaint; what a clerk convicted which hath his clergie shall forfeit, and at what time; and that none that hath his clergie allowed ought to make any purgation at this day; and that the king may pardon the burning of the hand, as well in an appeale, as upon an indictment.

^a If the principall hath his clergie before attainder, the accessory either before or after ought to be discharged.

^b You may adde to the former report a record in rot. Claus. an. 3 E. 3. m. 2. & 18. That for sacriledge the ordinary may allow clergie. So as it is in the election of the ordinary, either to allow or disallow clergie in that case.

^c See a notable record Trin. 21 E. 3. coram rege, Rot. 173. Hertford, that *privilegium clericale non competit seditioso equitanti cum armis platis, et cotearmuris, per leges Angliæ.*

8 E. 2. cor. 399.
46 E. 3. Conu-
sance 36.
Stanf. pl. coron,
51. k.
Regist. 129.
13 R. 2. ca. 5.
2 H. 4. cap. 11.
Pl. com. 37.
2 R. 3. to. 12.
19 H. 6. 7.
30 H. 6. 6. per
Prisott.
Fortescue, ca.
32.
5 Eliz. cap. 18.
*[114]

Trin. 7 Eliz.
Dier 241. the
case of Brook
alias Copham,

Lib. 11. fo. 29,
30, &c. Alex-
ander Poulterers
case. Lib. 5. 26,
27. in Caudries
case. Vid. lib. 5.
fo. 50. Biggens
case, & fo. 110.
Hestons case.
18 Eliz. cap. 6.
^a Lib. 4. fo. 43,
44. Syers case.
ib. Bibiths case,
2 E. 3. 27.
22 E. 3. cor.
260. 7 H. 4. 16,
10 H. 4. 5.
3 H. 7. 1.
3 H. 7. cor. 53.
4 E. 6. Br. cor.
184.
3 Ass. 14. 5 Ass.
5. 11 H. 4. 93.
^b Rot. cl. 3
E. 3. m. 2. 18,
^c Tr. 21 E. 3.
It cor. rege, Rot.
173. Hertford,

^d 25 H. 8. cap. 3.
³² H. 8. cap. 3.
 Vid. 1 E. 6.
 ca. 12. 5 E. 6.
 ca. 10.

^d It is provided by the statute of 25 H. 8. that if any person be indicted of felony for stealing of any goods or chattels in any county, and thereupon arraigned, and be found guilty, or stand mute, or challenge peremptory above the number of twenty persons, &c. they shall lose the benefit of their clergie, in like manner as they should have done, if they had been indicted and arraigned, and found guilty in the same county, where the same robbery or burglary was done or committed, if it shall appear to the justices, &c. by evidence given before them, or by examination, that for such robbery or burglary in the same shire where they were committed or done, they should have lost the benefit of their clergie by force of the said statute, viz. of 23 H. 8. cap. 1.

Any person indicted.] This act extendeth not to appeales by writ or bill, nor to the appeales of the approvors.

^c Poulterers case.
 Ubi supra fo. 31.
 [115]

Or by examination.] ^c By these words though the offender confesse the indictment, or stand mute, or challenge above twenty, &c. yet if by examination before the justices, the truth of the case appeareth, he may be put from his clergie.

Vid. Stanf. pl.
 cor. fo. 123, &c.
 De Clergie.

By force of the said statute.] Viz. 23 H. 8. so as if for any burglary or robbery in one county he were not ousted of his clergie by the statute of 23 H. 8. but some later statute, then the delinquent shall have his clergie in the county where the goods are carried: for example, if the robbery be done in a dwelling house, the owner or dweller, his wife, his children, or servants then being within the house, and put in feare and dread by the same, and the goods be carried into another county, he shall not have his clergie: but if the robbery in the dwelling house be not done with all the circumstances mentioned in this act of 23 H. 8. (which circumstances are not required by the statute of 5 E. 6. cap. 9.) he shall not be ousted of his clergie in the other county. And so of all like cases.

See 1 Jac. cap. 8. clergie taken from him which do stab another that hath not drawne a weapon, nor stricken first.

C A P. LI.

Of Abjuration and Sanctuary.

Cust. de Norm.
 cap. 24 & 8.
 Inter leges Inae.
 cap. 5.

Inter leges Ca-
 noti, fo. 105.
 ca. 3.

ABJURATION by the course of the common law may be thus described. When a man or a woman had committed felony, and the offender for safeguard of his or her life had fled to the sanctuary of a church or churchyard, and there before the coroner of that place within forty dayes had confessed the felony, and took an oath for his or her perpetuall banishment out of the realm into a foraine countrey, choosing rather *perdere patriam, quam vitam*. But that foraine countrey, into which he was to be exiled, must not be amongst infidels. And this was the ancient law of this realme, which was, *prohibemus autem ne Christiana fide tinctus quispiam à regno procul amandetur, neve ad eos qui nondum Christo fidem adjunxerunt relegetur, ne eorum aliquando fiat animorum jaclura, quos propria Christus vita redemit.*

The foundation of the abjuration was the sanctuary of the church or church-yard. For he or she, that was not capable of this sanctuary, could not have the benefit of abjuration. ^a And therefore it is said, that he that committed sacrilege, because he could not take the priviledge of sanctuary, could not abjure. For the forme of abjuration see the statute of abjuration, Vet. Magna Carta, part 1. fol. 167. b. The ^b common law herein was very ancient, and had saved the life of many a man; and continued without change untill an act made in the twenty second year of H. 8. cap. 14. whereby it was provided, that the party abjured should not be banished out of the realm, but to some other sanctuary within this kingdom: ^c and to say the troth, abjuration was exceedingly intricate and perplexed by the said act of 22 H. 8. cap. 14. and other statutes: for which causes all statutes made before the thirty fifth yeare of queen Elizabeth, concerning abjured persons, stand repealed by the statute of 1 Jac. cap. 25. whereby the ancient common law concerning abjuration for felony was revived.

^d But by an act made in the twenty first year of king James it is enacted, that no sanctuary or priviledge of sanctuary should be admitted or allowed in any case. By which act, such abjuration as was at the common law, founded (as hath been said) upon the priviledge of sanctuary, is wholly taken away: and the writ in the Register 69. a. *De restitutione extracti ab ecclesia* is become of no use.

^e And yet the abjuration by force of the statute of 35 Eliz. ca. 1. before justices ^{*} of peace, or justices of assize, or by force of an act made at the same parliament, cap. 2. before two justices of peace or the coroner by a recusant, remaineth still; because such abjuration hath no dependencie upon any sanctuary. Which being sufficient to shew how the law standeth at this day, both concerning sanctuary and abjuration, might suffice.

But yet he that is desirous to reade the generall learning of abjuration the branch, and of sanctuarie the root, let him reade the Mirror, ca. 1. §. 13. & cap. 5. §. 1. where he may reade the right use of abjuration by the ancient law of England. Et inter leges Edwardi, nu. 10. Custum. de Normandie, cap. 24. Officium coronatorum, tit. Abjuration, Rast. pl. 2. Bracton, li. 3. fo. 135. & 136. Britton, cap. Abjuration, fo. 24. & cap. Coroners, fo. 7. And Fleta, lib. 1. cap. 29. 8 E. 2. ubi supra. 3 E. 3. Coron. 213. 335. 21 E. 3. 17. 29 Ass. p. 34. Rot. Pat. 25 E. 3. part. 3. m. 16. Hil. 43 E. 3. Rot. 10. Coram Rege Buck. Hil. 26 E. 3. Coram Rege Rot. 20. *Quando aliquis abjuravit regnum, crux ei deliberat fuit in manu sua portanda in itinere suo per semitas suas, et vocatur vexillum sanctæ ecclesiæ.* Rot. Parl. 2 R. 2. nu. 28. the right use of sanctuary. 6 H. 4. 2. 8 H. 4. 2. 11 H. 4. 40. 7 H. 6. 8. 27 H. 6. 7. 2 E. 4. 17. 21. 9 E. 4. 29. 12 E. 4. 1, 2. 3 H. 7. Coron. Fitz. 54. 1 H. 7. 23. 25. 8 H. 8. Kelway. 188, 189. 190, 191. Fitz. Justice of Peace, fol. 202. Stanf. pl. cor. cap. Abjuration, fo. 116, 117, &c. et ibidem Sanctuary, cap. 38. Dier, 13 Eliz. fo. 296. lib. 5. fo. 12. 26. lib. 6. fo. 9. lib. Intrat. tit. Abjuration and Sanctuary.

^a 8 E. 2. cor. 420.

^b Sir Thomas Weyland Chief Justice of the Common Pleas, anno 17 E. 1. Vid. inter placita parl. an. 19 E. 1. apud Ashring in Cro. Epiphaniæ.

^c 50 E. 3. cap. Artic. Cleri, 9 E. 2. c. 10. 1 R. 2. cap. 9. 7 H. 7. cap. 7. 21 H. 8. cap. 2. 22 H. 8. ca. 14. 26 H. 8. ca. 13. 28 H. 8. cap. 1. 33 H. 8. cap. 15. 1 E. 6. cap. 12. 2 E. 6. ca. 2. & 33. 5 E. 6. cap. 10 13 Eliz. ca. 7. 1 Jac. ca. 25.

^d 21 Jac. in the continuance of statutes, &c.

^e 35 El. ca. 1. & 2.

* [116]

C A P. LII.

De Hutesio et Clamore.

OF HUE and CRY.

THE one being an expression of the other. For *huer* in French (*unde hutesium*) is to hoot or shout; in English to crie. There be two kindes of hues and cries, the one by the common law, and the other by statute. Thereupon there are two pursuits, the one for the king, the other for the party by private suit.

Hue and cry by the common law, or for the king, is, when any felony is committed, or any person grievously and dangerously wounded, or any person assaulted and offered to be robbed either in the day or night; the party grieved, or any other may resort to the ^a constable of the town, and acquaint him with the causes, describing the party, and telling which way the offender is gone, and require him to raise hue and cry. And the duty of the constable is, to raise the power of the towne, ^b as well in the night as in the day, for the prosecution of the offender, and if he be not found there, to give the next constable warning, and he the next, untill the offender be found, and this was the law before the conquest. ^c *Si quis latroni obviam dederit eumque nullo edito clamore abire permiserit, quancunque fuerit latronis vita aestimata extremum solvat denariolum, aut pleno, perfecto que jurejurando de facinore se nihil habuisse cogniti confirmato. Sin quis proclamantem exaudierit, neque vero fuerit insequutus, suæ in regem contumaciæ (ni omnem criminis suspicionem diluerit) pœnas dato.*

In antiquo M. S. si quis furi obviaverit, et sine vociferatione gratis eum dimisit, emendet secundum veram ipsius furis, vel plena lada se adlegiet, quod cum eo falsum nescivit: si quis audito clamore supersedit, reddat oversameffa regis aut plene se laidiet. Bracton who wrote before any act of parliament concerning hue and cry, saith, *omnes tam milites, quam alii qui sunt 15 annorum † et amplius, jurare debent quod utlagatos, murtherores, robbatores, et burglatores non recipient, &c. Et si hutesium vel clamorem de talibus audierint, statim audito clamore sequantur cum familia, &c.* and herewith agreeth Britton.

The statute of W. 1. cap. 9. being in affirmance of the common law, provideth, *Que tous communement soient prests a les somons des viscounts, et au crie de pais de suer et arrester felons, quant misterserra, auxibicns deins franchises come de hors.*

And the statute of 4 E. 1. declareth the law *similiter de omnibus homicidiis, burglar, occisis, seu * periclitantibus levetur hutesium, &c. et omnes sequantur hutesium, et vestigium si fieri potest: et qui non fecerit, et super hoc convictus fuerit, attachietur quod sit coram justiciariis de gaola, &c.* And by that act it appeareth that so it is in case of rape, and therewith agreeth, ^a Bracton also.

The life of hue and cry is fresh suit.

^b Thamar the daughter of king David being violently ravished by her brother Amnon, the text saith of her, *quæ aspergens cinerem capiti*

^a Rot. Parl. an. 6E. 3. num. 6. Constable of the town to make hue and cry.

^b 2 E. 4. 8. b. & 9. a.

^c Inter leges Canuti, fo. 110. ca. 26. See inter leges Edw. Conf. ca. 21.

For Oversameffa, See lib. Rub.

c. p. 36.

Bracton, li. 3. fo.

† [117]

Britton, fo. 15. & 19.

Fleta, li. 1. c. 24. See the 2. part of the Institutes.

W. 1. ca. 9.

4 E. 1. de officio coronatoris.

See the statute of Winch. 13 Ed. 1.

* 7 E. 3. fo. 16. 22 Ass. 57.

38 E. 3. fo. 6. assaulted to be robbed. 9 E. 4.

26. See the Custom of Norm. ca. 24.

^a Bracton, li. 2. fo. 28 E. 3. ca.

11.

^b 2 Regum, c. 13. vers. 19.

capiti suo, scissa talari tunica, impositisque manibus super caput suum ibat ingrediens, et clamans.

^c They which levy not hue and cry, or pursue not upon hue and cry, shall be punished by fine and imprisonment. ^d Also if a man be present when a man is murdered, or robbed, and doth not endeavour to attach the offender, nor levy hue and cry, he shall be fined and imprisoned.

Of hue and cry by force of acts of parliament in five cases. ^e First, if a watchman doth arrest a night walker, and he disobey and fly, the watchman may make hue and cry.

2. ^f *Si quis forestarius, parcarius, aut warrennarius in baliva sua malefactores aliquos invenerit vagantes ad damnum ibidem faciend', et qui se forestariis aut warennariis illis post clamorem et hutesum levatum ad pacem regis ad standum recte reddere noluerint, immo ad malitiam suam exequend' et continuand' et pacem regis diffugiend' fugam fecerint, et vi et armis se defenderint, licet forestarii, parcarii et warrennarii illi, aut alii quicunque ad pacem domini regis existentes in comitativa forestariorum, parcariorum, aut warrennariorum illorum venientes ad tales malefactores sic inventos arrestand' seu capiend', aliquem seu aliquos hujusmodi malefactorum interfecerint, non propter hoc occasionentur coram domino rege, et justiciariis quibuscunque aut aliis balivis domini regis, aut aliorum quorumcunque infra libertatem aut extra: nec propter hoc amittant vitam, aut membrum, aut alium pœnam subeant, immo firmam pacem domini regis inde habeant. Sed bene caveant forestarii, parcarii, warrennarii, et alii quicunque, ne occasione contentionis, discordiæ, contumeliæ, aut alicujus malevolentiae, seu odii præhabiti aliquibus per balivas suas trans-eund' malitiose imponant, quod occasione malefaciendi in balivis suis intrant, cum hoc non fecerint, nec ipsos vagantes ut malefaciant, nec malefacientes invenerint, nec causam malefaciendi quærentes, et sic eos occidant. Quod si fecerint, et de hoc fuerint convicti, fiat de morte sic interfectorum, prout aliorum ad pacem domini regis existentium, et prout de jure et secundum consuetudinem regni fuerit faciend'.*

3. Welshmen outlawed, or indicted of treason or felony, that fly into Herefordshire, shall be apprehended, &c. or else pursued by hue and cry, and a forfeiture upon those that do not pursue.

4. Hue and cry shall be levied upon takers of carriage within the verge of the staple of that which pertaineth to the staple.

5. Where a man is robbed: upon hue and cry, &c. what remedy he shall have against the hundred, &c. and how and in what manner the hue and cry shall be made in that case, see the statutes, and lib. 7. fo. 6. & 7. the statutes well expounded. And this robbery must be done in the day time, and not in the night, otherwise the party grieved shall not have his action. And so note a diversity between a hue and cry at the common law, or for the king, and a hue and cry by statute where the party grieved is to have his remedy by private action. Note also a diversity in the prosecution at the common law, or for the king, and by the statutes which give the party remedy, for a prosecution to the next constable is good by the common law, but so it is not by the said statutes which give the party grieved his action. See lib. 7. fo. 7. & 8. 22 El. Dier, 370. So the prosecution at the common law is a good excuse upon an indictment at the kings suit, but note that it is no bar to the parties action.

Where hue and cry either by the common law, or by force of any statute is levied upon any person, the arrest of such person is lawfull,

^c Brañ. li. 3. fo. 118. b.
Ca. Itin. m. c. 155. 3 E. 3. cor. 333.

^d See 8 E. 2. cor. 395.

^e Stat. de Winc. watch. 4 H. 7. fo. 2. 18.

^f Statutum de anno 21 E. 1. Magna Cart. fo. 118. Foresters.

23 H. 6. ca. 5. Vid. 17 H. 8. c. 26. Welshmen.

27 E. 3. ca. 4. staple.

Winch. 13 E. 1.

28 E. 3. c. 11.

27 El. c. 13.

38 El. ca. 25.

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Lib. 7. fo. 7, 8. 22 El. Dier 370.

29 E. 3. 9.

38 E. 3. 6.

See 5 H. 7. 5. a.

21 H. 7. 28. a.

lawfull, although the cause of the hue and cry be feigned, and if the cause be feigned, he that levy the same shall also be arrested, and shall be fined and imprisoned. But common fame and voice is not sufficient to arrest a man in case of felony, unlesse a felony be done in deed.

Stat. de 18 E. 2.

It is an article of the leet, to enquire of hues and cries levied and not pursued.

De civitate London capienda in manum regis pro hutesio non levato.

Rot. Claus.

30 H. 3. m. 5.

Mandatum est Guilielmo de Haverhull thesaurario regis, quòd civitatem London capiat in manum regis, eo quòd cives ejusdem civitatis non levaverunt hutesium et clamorem pro morte magistri Guidonis de Arretio et aliorum interfectorum secundum legem et consuetudinem regni. Teste rege apud Wndestok 22 die Augusti.

C A P. LIII.

OF MAYHEM.

^a First part Institutes §. 194.

502. Stanf. Pl.

Cor. 38. b.

Cust. de Norm.

ca. 79. Mehai-

mus. Bracton,

lib. 3. 144, 145.

Fleta, li. 1.

ca. 38.

^b Rot. Claus.

anno 13 H. 3.

nu. 9.

See before, ca.

13. for cutting

out of tongues,

&c.

^c Camden Brit.

page 593.

^d Bract. lib. 3.

fo. 148. nu. 4.

Mirror, cap. 4.

§. De pains in

18 E. 3. 20. a.

OF mayhem you may read at large in the ^a first part of the Institutes sect. 194. & 502. and in justice Stanford. And where (as it is there cited) he saith, *Castratio verò, quam vis latens sit, adjudicatur mahemium*. Hereof we find an example.

^b *H. Hull indictatus fuit de mayhemio, eo quòd abscidit virilia Johannis monachi, &c. quem idem H. deprehendit, &c. cum A. uxore sua.* Of the like accident you may read in Camden.

^c *Dominus Robertus Nevil (cum numerosam prolem ex uxore suscepisset) ignotus in adulterio deprehensus, et ab adulteræ marito in vindictam genitalibus mutilatus, brevi vi doloris expiravit.*

Vide inter leges Alveredi. cap. 40 de vulneribus, fo. 43.

^d By the ancient law of England, he that maimed any man, whereby he lost any part of his body, the delinquent should lose the like part, as he that took away another mans life, should lose his own.

And it is truly said, that *duellum est mahemium inceptum*, and *mahemium est homicidium inchoatum*. And therefore in the appeal or indictment it is said *fe'onice mayhemavit*.

divers manners. Brit. fo. 48. b. Fleta, li. 1. ca. 38. *Membrum pro membro.* Vide 18 E. 3. fo. 94. 8 H. 4. 20, 21. Coron. 458.

C A P. LIV.

OF PREMUNIRE.

P R I M E R M E N T pur ceo que monstre est a nostre seignour le roy per grevouses et clamouses pleints des grandes et communes avant ditz, coment plusors gents sont, et ount estre treits hors de realme a responder des choses dount la conusance appartient a la court nostre seignour le roy; et auxint que les juggements rendus in mesme le court sont empeache en autre court, in prejudice et disherison nostre dit seignour le roy et de sa corone, et de tout le people de son dit realme, et in defeasance et anientissement de la common ley de mesme le realme use de tous temps. Sur quoy eue bone deliberation ove les grandes et auters de dit counsell, assentus est et accord per nostre dit seignour le roy, et les grandes et communes suisditz. Que tous gents de la ligeance le roy, de quel conditione que ilz sont, que trahent nulluy hors de realme (1) en plea dont le conusance appartient a la court le roy, ou des choses dont judgement soit rendus (2) en le court le roy; ou que suent en autri court a defaire ou impeacher les juggements rendue in le court le roy (3) eient jour, &c. (4) In English thus.

27 E. 3. cap. 1.
The print being examined agreeeth with the record. See the first part of the Institutes, sect. 199.

The statute of 16 R. 2. cap. 5. saith, In curia Romana, vel alibi.

F I R S T because it is shewed to our lord the king by the grievous and clamorous complaints of the great men and commons aforesaid, how that divers of the people be, and have been drawne out of the realme to answer of things, whereof the cognisance pertaineth to the kings court: and also that the judgements given in the said court be impeached in another court in prejudice and disherison of our lord the king, and of his crowne, and of all the people of his said realme; and to the undoing and destruction of the common law of the same realme at all times used. Whereupon, upon good deliberation had with the great men and other of his said counsell, it is assented and accorded by our lord the king, and the great men and commons aforesaid, that all the people of the kings ligeance, of what condition that they be, which shall draw any out of the realme in plea, whereof the cognisance pertaineth to the kings court, or of things whereof judgement is given in the kings court, or which doe sue in any other court to defeat or impeach the judgements given in the kings court, shall have day, &c.

The effect of the statute of 16 R. 2. is, if any pursue or cause to be pursued in the court of Rome, or elsewhere, any thing which toucheth the king, against him, his crowne and regality, or his

16 R. 2. cap. 5.

Fourth part of
the Institutes,
cap. 8. artic. 1.
Die Decemb.
anno 21 H. 8.
against cardinall
Woolsey.
Vet. N. B. 143.

his realme, their notaries, procurators, &c. fautors, &c. shall be out of the kings protection.

* In this act is declared the soveraignty, prerogative, and freedome of the crowne of England, and the first article exhibited by the lords of the councell, (whereof sir Thomas More chancellor was one) and the principall judges concerning this matter, is worth your reading.

This offence is called a premunire of the words of the writ, grounded upon this and other statutes for punishment thereof. For the words of the writ be, *Rex vicecomiti, &c. Præmunire fac.* A. B. &c. And rightly it is so called, for he that is *præmonitus* is *præmunitus*.

Before the making of this statute of 27 E. 3. there were three great mischiefs. First, that the kings subjects have been drawn out of the realme, to the answer of things, whereof the conusance pertained to the kings court. Secondly, of things whereof judgements have been given in the kings courts. And thirdly, that after judgements given in the kings courts of the common law, of matters determinable by the common law, suits were commenced in other courts within the realme, to defeat or impeach those judgements. And these three mischiefs had three unsufferable effects: first, the prejudice and disherison of the king and of his crowne. Secondly, the disherison of all his subjects. And thirdly, the undoing and destruction of the common law of this realm: all which appeare in the preamble of this act.

They are called (other courts,) either because they proceed by the rules of other lawes, as by the canon or civill law, &c. or by other trials, then the common law doth warrant. For the triall warranted by the law of England for matters of fact, is by verdict of twelve men before the judges of the common law of matters pertaining to the common law; and not upon examination of witnesses in any court of equity: so as *alia curia*, is either that which is governed *per aliam legem*, or which draweth the party *ad aliud examen*. For if the freehold and inheritances, goods, and chattels, debts, and duties, wherein the king or subject hath right or property by the common law, should be judged *per aliam legem*, or be drawne *ad aliud examen*, the three mischiefs aforesaid expressed in the preamble and in this act should follow, viz. disherison of the king and of his crowne, the disherison of all his people, and the undoing and destruction of the common law at all times used: by which words of this act it appeareth, that all these mischiefs were against the ancient common lawes at all times used. And that also appeareth by the ancient writs of the common law, called *ad jura regia*, whereof some touch hath been given before, and which are worthy the reading: and also by divers acts of parliament; as the statute of Carlile, anno 35 E. 1. whereof we have treated before in the second part of the Institutes: and by the statute of 25 E. 3. *De provisoribus*. And it is observed, that in 29 E. 3. within two yeares after the said act of 27 E. 3. that they that were called in question upon the statute of premunire, *invenierunt manucaptos sufficientes, et sacramentum præstiterunt, quod non attemptabunt, citra mare vel ultra, quod in præjudicium regis, legum, seu coronæ, seu judiciorum in curia regis reddat, tendere valeat quoquo modo, &c.* Whereby, and many other like records it appeareth, that judgements

Regist. 61, 62,
&c.

Mic. 29 E. 3.
coram rege.
Rot. 44. Cornub.
V. 46 E. 3. 13,
14. Nota, citra
mare.

judgements ought not to be questioned *citra mare*, in any court, unlesse it be according to the course of the lawes of the realme.

By the statute of 4 H. 4. cap. 23. it is ordained and stablished, that after judgement given in the courts of our lord the king, the parties and their heirs shall be thereof in peace, untill the judgement be undone by attaint, or by error, if there be error, as hath been used by the lawes in the times of the kings progenitors.

^a Also that which hath been said appeareth by our books and ancient records, as hereafter shall appeare.

^b 5 E. 4. fol. 6 where the statute of 16 R. 2. cap. 5. saith, *In curia Romana vel alibi*, ecclesiasticall courts within the realme are within this word [*alibi*.]

^c Mich. 11 H. 7. it was adjudged by the whole court, that a suit in the ecclesiasticall court within the realme for a temporall cause, was in case of premunire.

^d A president of a premunire, for suing in the ecclesiasticall court for a debt.

^e It was resolved, that he that sued in the ecclesiasticall court for the forgery of a last will and testament, incurred the danger of a premunire, because the party grieved might have his remedy by the common law. And in the same year of 17 H. 7. justice Spilman also reporteth, that one Turberville, as well as for the king, as for himselfe, did sue a premunire against a person for suing for tithes in the ecclesiasticall court, alledging the same to be severed from the nine parts, and judgement given against the defendant.

Also it appeareth that the admirals court is within this word [*alibi*] if he hold plea of any thing, which is not done *super altum mare*, but *infra corpus comitatus*.

^f Richard Beuchampe esquire and Thomas Pauncefoot esquire, and others, are charged with the offence of premunire, for that they sued John Cressley esq; before Henry duke of Exeter admiral of England, for taking away a crosse of gold and other goods, supposing the same to be taken *super altum mare*, where in truth they were taken at Stratford in the county of Essex; where the statute of 16 R. 2. is recited, that none should sue *in curia Romana seu alibi*, &c. and that the conusance of this plea belonged to the common law, and not to the court of the admiral. And so it is of the constable and marshall, if they hold plea of a matter determinable by the common law.

^g Isabel Winnington exhibited a bill of premunire against William Powdich upon the statute of 16 R. 2. cap. 5. for suing in the admiral court before John earle of Huntington, admiral of England, for a cause which belonged to the common law, whereunto the defendant pleaded not guilty.

And the reason of all these cases is, because they draw matters triable by the common law, *ad aliud examen*, and to be discussed *per aliam legem*.

But some have made a question, whether since the ecclesiasticall jurisdiction was acknowledged to be in the crowne, an ecclesiasticall judge holding plea of a temporall matter belonging to the common law, doth incur the danger of a premunire. Though hereof there is no question at all, yet lest any man might be led into an error in a case so dangerous, we will clear this point by reason, president,

4 H. 4. ca. 23.

^a 10 H. 4. 1, 2.
18 H. 6. 6. b.

^b 5 E. 4. 6. b.
44 E. 3. 36.

^c 11 H. 7. Premunire. Fitz.
15 H. 7. 9. acc.
lib. Intr. Rast.
468.

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^d Rast. pl. 429.
b. & 430.

^e 17 H. 7. of the report of justice Spilman.

^f Mic. 38. H. 6.
coram rege.

^g Mic. 9 H. 7.
coram rege.
Rast. pl. 23.
but this cause is
entred. Trin.
9 H. 7. Rot. 37.
coram rege.

president, and authority. The reason holdeth still to draw the matter *ad aliud examen*, &c. And the like question might be made for the admirall court, which is, and ever was, the kings court, but governed *per aliam legem*: and so likewise of the court of the constable and marshall.

At a convocation holden *anno* 22 H. 8. by a publick instrument made by all the bishops and the whole clergie of England, the king was acknowledged to be supream head of the church of England.

^h 24 H. 8. tit.
premunire,
Brook 16.

^h After this, viz. 24 H. 8. it appeareth that the statute of premunire remained in force against ecclesiasticall judges, for holding of pleas meerly determinable by the common law.

Hil. 25 H. 8. co-
ram rege, Rot.
Rich. Nick Bi-
shop of Norwich
his case.

In 25 H. 8. Richard Nick bishop of Norwich was attainted in a premunire at the kings suit, and his case was this. Within the towne of Thetford there then was a custome, that all ecclesiasticall causes arising within the said towne should be determined before the deane there, having a peculiar ecclesiasticall jurisdiction, and that no inhabitant of the same town should be drawn before any other ecclesiasticall judge, and that every person suing contrary to that custome, the same being presented before the maior of Thetford, should forfeit six shillings eight pence; and that an inhabitant of Thetford for an ecclesiastical cause rising within Thetford, sued another before the bishop of Norwich within his consistory court at Norwich: and this was presented before the maior of Thetford according to the custome, whereby he forfeited six shillings eight pence. The said bishop cited the said maior for taking of the said presentment *pro salute anime* to appear before him at his house at Hoxon in Suffolke, where the maior appeared, and there the bishop *ore tenus* enjoined him, upon pain of excommunication to adnull the said presentment before a day. And for this offence he was attainted in a premunire upon his confession before Fitz James chief justice, and the court of kings bench, upon the statute of 16 R. 2. the record whereof we have seen. By which judgement two points are cleared: first, that the statute of premunire extends to ecclesiasticall courts within the realme. Secondly, that after the king was in possession of his supremacy, the bishops incurred the danger of premunire.

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Trin. 36 H. 8.
coram rege, Rot.
9. the B. of
Bangors case.
D. & St. lib. 2.
ca. 24. fo. 106.
b. Lib. 2. ca. 23.

The bishop of Bangor was attainted in a premunire for holding plea of an advowson, and of tithes severed from the nine parts.

Saint Germin in his book of Doctor and Student, who wrote after 26 H. 8. holdeth: that if a man maketh a promise for a temporall thing, and swear to perform it, and doth it not; if he be sued for perjury in the spirituall court, a prohibition or a premunire lyeth in that case. Also he saith; if a man be excommunicate in the spirituall court for trespassse, or such other thing, as belongs to the kings crown and his royall dignity, &c. the party, if he will, may have a premunire fac. against him.

Br. tit. Premu-
nire. 21.
Temps. E. 6.

Brook reporteth, that Barloe bishop of Bath and Wels, in the reign of king E. 6. deprived the dean of Wels, which deanry was a donative: and thereby incurred the danger of a premunire.

1 Eliz. cap.

By the statute of 1 Eliz. (which restoreth the ancient jurisdiction ecclesiasticall to the crown) the act of 1 & 2 Ph. and Mar. cap. 8. is repealed. But there is a speciall proviso in that act of 1 Eliz. that it should not extend to repeale any clause, matter, or sentence contained or specified in the said act of 1 & 2 Ph. and Mar. which doth

doth concerne matter of premunire, but that so much of that which concerneth any matter or cause of premunire, should stand in force and effect. And that clause of the statute of 1 and 2 Ph. and Mar. is this. That whosoever shall by any proces obtained out of any ecclesiasticall court, within the realme or without, by pretence of any spirituall jurisdiction, or otherwise, contrary to the lawes of the realme, inquiet or molest any person, &c. for any mannors, &c. parcell of the possessions of any religious house, &c. shall incurre the danger of the act of premunire, in anno 16 R. 2.

See the statute of 25 H. 8. which also hath reference to the said act of premunire, and is revived by 1 Eliz. 25 H. 8. ca. 20.

Thomas Stoughton parson of N. in Suffolke, brought a writ of premunire against R. T. upon this statute of 27 E. 3. for suing in the court of audience of the archbishop of Canterbury, to impeach a judgement given in a *quare impedit*, before the justices of assize in the county of Suffolk, &c. the defendant pleaded not guilty, &c. And this (omitting many other things for this matter) shall suffice. And now let us peruse the body of the act.

Trin. 29 Eliz. in
communi banco
Rot. 747. Tho.
Stoughtons case

(1) *Trahe nulluy hors de realme.*] Of this there is no question, being against the ancient law of the realme always in use; as by this act appeareth. And this was a remedie for the first mischief.

(2) *Ou des choses dont juggements fuer' rendus, &c.*] This branch prohibiteth all forain suits, viz. in the court of Rome, &c. for any thing whereof judgement was given in the kings court. And this was a remedie for the second mischief.

(3) *Ou que suont en autre court a defaire ou impeacher les juggements rendue in le court le roy.*] This is a remedy for the third mischief. For having by the second branch provided against forain suits to undoe, or impeach judgements in the kings court, this branch doth (as hath been said) extend to all courts, which proceed by the rule of another law, or draw the party *ad aliud examen*, and therefore this branch doth extend to ecclesiasticall courts, to the court of the constable, and marshall, to the court of the admiralty, and to the court of equity proceeding in course of equity: for it had been to no effect to have provided against forain suits, which were troublesome, tedious, and chargeable, and to have suffered the party to have attempted and prosecuted any thing at home within this realm, to the prejudice and disherison of the king, and his crown, and all his subjects, and to the subversion of the common law. And first we will speak of the court of equity. This court cannot proceed in course of equity after judgement at the common law, for three reasons. First, for that it draweth the matter triable, and determinable by the common law, *ad aliud examen*, viz. to a triall by witnesses, which (as hath been said) is contrary to the ancient law of the realm, and against the purvien of this statute. Secondly, after judgment the parties ought to be at peace and quiet, for *judicia sunt tanquam juris dicta*, and if the party against whom judgement is given, might after judgement given against him at the common law, goe into court of equity for matter in equity, there either should be no end of suits, or every plaintiff would leave the common law, and begin in the court of equity, whither in the end he must be brought, and that should tend to the utter subversion of the common law, as it is said in the act. Thirdly, the court of equity in the proceeding in course of equity is no court of re-

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37 H. 6. 14.

cord,

cord, and therefore it cannot hold plea of any thing, whereof judgement is given, which is a judiciall matter of record. And this is the ancient law at all times used, as this act speaketh. As taking some few examples for many, both before, and after this statute.

Anno 6 E. 1.
the earl of Corn-
wals case.
Lanceston in
Thesaur.

In the case of Edmond earl of Cornwall in anno 6 E. 1. it appeareth, that after judgement given before Roger Loveday and Walter Winborn justices of oier and terminer, against Walter bishop of Exeter and his tenants, the said bishop procured the bishop of Landaff in the parish churches of Cornwall and Devonshire to pronounce sentence of excommunication by the sentence of the archbishop of Canterbury (which sentence was had by the procurement of the said bishop of Exeter) against all persons of what estate, degrees or dignity soever, that dealt in the proceedings, &c. against the said bishop and his tenants before the said justices: and in this part of the record being in French, it is said *La corone, et la dignite nostre seignieur le roy ne doit per autre estre justice ne guyne, &c. Et les choses que sont passees en sa court per judgement, ou en auter manner, ne devient estre en autri court receees, &c.* Out of this record we may observe three things. First, what the ancient law of this realm was, before the making of this act. Secondly, that [*en autri court*] which are the words of this act, was taken to be another court within the realm. Thirdly, that the mischief before this act, was for suits in other courts within this realm, after judgements given in the kings courts. Read the whole record, which beginneth thus. *Cornub. dominus rex mandat, &c.*

Mich. 13 E. 3.
In communi
banco. Rot. 40.
Inter Johannem
de Dingle and
Mich. de Englis
Bedf.

^a Fleta li. 6. ca.
36. Trin. 19 E.
3. Rot. 50. Co-
ram rege John
Boltons case.
Mich. 19 E. 3.
Rot. 16 & Rot.
29. Alan de Co-
nesburghs case.
F. N. B. 169. f.
20 E. 3. effoin.
24. 21 E. 3.
40. b.

^b 4 H. 4. ca. 23.
^c Pasc. 5 E. 4.
Coram rege inter
Cobbe and Nore.
^d Rot. Parl.
simile. 3 H. 5.
nu. 44. & 3 H.
6. nu. 22.

^e 22 E. 4. 37.

And in 13 E. 3. there was a suit in the court of Rome after judgement in the kings court, and in that record it is said, *In regi contemptum, et coronæ suæ præjudicium, ac judicii prædicti enervatione manifestam, &c. Ac quod judicia in curia regis rite reddita frustra redderentur, nisi debitum sortirentur effectum.*

^a Fleta who wrote before this statute, saith, *Judicia debent rata permanere, et firma consistere, usque ad condignam satisfactionem inviolabiliter observentur.*

And as a maxime of the common law in the judiciall Register, fo. 12. 35. 41, &c. it is often said, *Ea quæ in curia domini regis rite acta sunt, debitæ executioni demandari debent.*

Now let us see what hath been done since the act. ^b The statute of 4 H. 4. cap. 23. hath been recited before, which is a judgement of parliament. ^c A judgement was obtained by covin and practice against all equity and conscience in the kings bench: for the plaintiff retained by collusion an attorney for the defendant, (without the knowledge of the defendant, then being beyond sea) the attorney confesseth the action, whereupon judgement was given; ^d the defendant sought his remedy in parliament, and by authority of parliament power was given to the lord chancellor by advise of two of the judges to hear, and order the case according to equity; which proveth that the chancellour could not do it of himself without higher authority.

^e No injunction after verdict at the common law is to be granted in chancery, and if the lord chancellor should grant an injunction in that case the judges said, that if the chancelor imprisoned the party

party for breach of the injunction, they would grant an *habeas corpus* and deliver him.

Amongst the articles preferred to the king by Sir Thomas Moore lord chancellor of England, and all the privy council, and by Fitz James chief justice, and justice Fitz-Herbert against cardinal Woolsey, one is in these words, [And the said lord cardinal hath examined divers and many matters in the chancery, after judgement thereof given at the common law, in subversion of your laws, and made some persons to restore again to the other party condemned that, that they had in execution by vertue of the judgement of the common law] which I have seen in parchment under all their hands, and is yet to be seen.

1 Decemb.
21 H. 8. Art. 20.

If judgements given in the kings courts should be examined in chancery, before the kings councill, or any other place, the plaintiff or demandant should seldome come to the effect of their suit, nor the law should never have end, &c. See the Diversity of Courts ca. Chancery.

Doct. and Stud.
ca. 18. the book
of Diversity of
Courts.

Ralph Heydon gent. was indicted of a premunire upon the statute of 27 E. 3. for procuring of Sir Nicholas Bacon lord keeper of the great seal, to grant an injunction in chancery after judgement given in an *ejectione firme* of lands in Hertfordshire. And the record saith, *Quod predictus Radus machinatus est antiquas leges, et consuetudines regni subvertere.*

Mich. 8 & 9 El.
in the kings
bench.

A writ of premunire upon the said statute of 27 E. 3. by Richard Beans against Richard Lloyd, for suing before the president and councill in Wales, after judgement given in the court of common pleas, in an action of debt for forty and two pound ten shillings, in *subversionem legum antiquarum, &c.*

Trin. 21 El. in
communi banco
Rot. 319.

Peter Dewle was indicted for procuring of Sir Thomas Bromly then lord chancelor, to grant an injunction in the chancery after a judgement given in an *ejectione firme*.

Pasch. 27 El. in
the kings bench.

John Heal of the Inner Temple London esquire, was indicted of a premunire, for procuring a suit in chancery after a judgment given at the common law, contrary to the statute of 27 E. 3. And the councill of Heal took two exceptions, one, that the court of chancery was not within the statute of 27 E. 3. another, that one of the parties to the suit in chancery was named in one place by one name of baptisme, and in another part of it by another. The court resolved that the court of chancery was within the statute of 27 E. 3. but found the other exception concerning misnaming to be true. And therefore they quashed the indictment, but made a memorandum indorsed upon the back of the indictment, that it was overthrown for mistaking a name, and not for the matter.

Trin. 30. El. in
the kings bench.
Diversity of
Courts, ca.
Chancery.

Thomas Throckmorton exhibited a bill in the chancery against Sir Moyl Finch after judgement given against him in the court of exchequer upon apparent matter of equity. Upon which bill the defendant demurred in law, and for that Sir Thomas Egerton then lord keeper inclined to rule over the demurrer, saying that he would not meddle with the judgement, but punish the corrupt conscience of the defendant, in relieving the plaintiff in equity: upon a petition to queen Eliz. (who ever favoured the due proceeding of her laws,) she referred the consideration of the demurrer to all the judges of England, who hearing councill learned on

Mich. 39 & 40
El. See the
fourth part of
the Inst. cap.
Court of Chan-
cery.

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Hil. 12. Ja.
regis coram
rege.

44 E. 3. 7. 36.
39 E. 3. 7.
7 E. 4. 2.
27 H. 6. 5.
36 H. 6. 30.
* 43 E. 3. 6.
42 E. 3. 7.
2 R. 3. 17.
27 H. 6. 5.
22 H. 8. tit.
Præm. Br. 1.
Tr. 39 E. 3.
Rot. 95. Coram
rege. 39 E. 3.
37. 30 E. 3. 11.
44 E. 3. 36.
Forebys case.
* 8 H. 4. 6.
Lib. 11. fo. 34.
b. in Alex.
Poulters case.

39 E. 3. 7.
9 E. 4. 2.
15 H. 7. 9.
F. N. B. 26. m.

27 H. 6. 5.
2 R. 3. 10.

both parts, and upon view of presidents in the time of H. 8. and since of injunctions granted after judgements, and finding very few of them to warrant that which had been affirmed, and none of them to be done by the advice of any of the judges, they all after divers hearings, and conferences, and consideration had of the laws and statutes of the realm, unanimously resolved, that the lord keeper could not after judgement given relieve the party in equity, although it appeared to them, that there was apparant matter in equity. And amongst others, the judges gave this reason, that if the party against whom judgement was given, might after judgement given against him at the common law, draw the matter into the chancery, it would tend to the subversion of the common law, for that no man would sue at the common law, but originally begin in chancery, seeing at the last he might be brought thither, after he had recovered by the common law, and thereupon they all certified, that the demurrer was good, and that Sir Moyl Finch the defendant ought not to answer.

An information upon this statute of 27 E. 3. against Sir Anthony Mildmay, for that he and other commissioners of sewers did impeach a judgement in the kings bench: he purchased a pardon from the king, and pleaded it.

See a privy seal bearing teste 18 Julii, anno domini 1616, to the contrary, obtained by the importunity of the then lord chancellor being vehemently affraid: *sed judicandum est legibus*, and no president can prevail against an act of parliament. And besides, the supposed presidents (which we have seen) are not authentically, being most of them in torn papers, and the rest of no credit.

(4) *Eient jour contenant le space de 2 mois per garnishment a faire a eux, &c.*] By this it appeareth that a premunire lyeth as well for the party, as for the king, and they both may join in one writ.

* If the defendant come not at the day, &c. by the expresse letter of the law judgement shall be given against him according to this act. This suit need not be against them by originall writ, but if the defendant be *in custodia mareschalli*, the suit may be against him by bill, because the end of the giving of the two months was, that they should have notice, which is satisfied, and therewith agreeth the presidents; and the defendant cannot be sued in any other court, when they are *in custodia mareschalli*. See the statute of 18 El. cap. 5. but that statute extends to common informers, and not when the suit is commenced by the party grieved.

a But if the defendant appear and plead, and the issue be found against him, or if he demur in law, &c. judgement shall be given against him, that he shall be out of protection, &c. And so hath this statute been interpreted, and judgement given accordingly. Peruse well the words of this act for this point, and see the book in 8 H. 4. 6.

By the statute of 38 E. 3. cap. 2. the defendant ought to appear in person, and therefore he cannot appear by attorney without a speciall writ out of the chancery: and this act doth bind as well those that are lords of parliament as others.

Avant le roy et son counsell.] Here counsell cannot be taken, as most commonly it is, for his judges of his courts of justice, who are said to be of his counsell for proceedings in courts of justice, because the courts of justice are hereafter in this act named: neither

ther doth it intend the kings privy counsell, but the king, and the lords of parliament in parliament, which is a court of justice.

See the first part of the Institutes, sect. 164. *Veigne les burgessees al parlement*. There is *commune concilium*, *magnum concilium*, *privatum seu continuum concilium*, and *concilium justiciariorum*, *le council des justices*.

The king is armed with divers counsell.

Ils, leur procurators, attornies, executors, notaries, et mainteynors.] Note by this act the procurers, attornies, executors, notaries, and maintainers shall have the same punishment, that the principall shall have. Note in the statute of 2 R. 2. this word (*fautors*) crept in, a word (derived *à favendo*) of a large extent, as it was construed in the reign of H. 8.

The plaintiff may choose whether he will make them all principals, or the one principall, and the other accessories, but the damages shall be severally taxed.

Stanf. pl. cor.
44. f. 44 E. 3.
7. 36 H. 6. 30.
42 E. 3. 7.
8 R. 2. Prem.
12. 8 H. 4. 6.
pl. com. 97. b.

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He that procures one to sue to the court christian, shall forfeit as much as he that sueth, and is principall as well as the other, and are in equall degree of premunire: but if they both be indicted, the one of the act, and the other of the procurement, and he that is charged with the procurement is found guilty, and the other by an other enquest is found not guilty, judgement shall never be given against him, which was indicted of the procurement, because he cannot be an offender, but in respect of the offence of the other.

Hors de la protection le roy.] By these words the persons attainted in a writ of premunire are disabled to have any action or remedy by the kings law, or the kings writs; for the law and the kings writs are the things whereby a man is protected and aided, so as he that is out of the kings protection, is out of the aid and protection of the law.

See Littleton
sect. 199. and
the 1. part of the
Institutes the
same sect.
Lib. 7. fo. 14. in
Calvins case.
25 E. 3. ca. 2.
See 5 El. ca. 1.

But by the statute of 25 E. 3. it is provided, that he that purchaseth provisions to abbies, or priories shall be out of the kings protection, and that a man may do with him, as with the enemies of the king and his realm, and that he, that shall commit any thing against such provisors in body or goods, or other possessions, shall be excused against all people.

Et leur terres, biens, et chateaux forfait au roy.] This is intended of the lands that he hath in fee-simple, or for life, which the delinquent might lawfully forfeit, and not lands in tail: for tenant in tail shall forfeit only for term of his life, for that was all he could lawfully forfeit at the making of this statute, either in case of treason or felony. And so it was resolved by the judges in the case of Trudgyn of Devonshire, who was attainted of a premunire upon the statute of 13 El. cap. 2.

34 H. 8. forfeit.
Br. 101.
Pasch. 21 El.
resolution of the
judges in Trud-
gyns case. Dier,
manuscript.
Vide before.
25 E. 3. Verb.
Et soit assavoir.

Nota, this is a new kind of forfeiture given by this law, and is penall, and cannot by equity extend further then the records, and therefore this act extendeth not to the forfeiture of fairs, markets, rents charges, rent seck, warrens, annuities, or any other hereditament that is not within this word (*terre*.)

Leur corps imprison, et rents al volunt le roy.] The greatnesse of these punishments doe shew the greatnesse of the offence.

It is to be observed, that the said statute of 16 R. 2. is strictly
L 2 panned

16 R. 2. ca. 5.

Examples of
these are quoted
before.

Vide justice
Spilman's Re-
port. Mich. 21.
H. 8. Cliffs case.

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1 Mar. ca. 1.

Dier manuscrip.
Hil. 1 El. le
case de Christo-
forson Evesque
de Chichester.

penned against offenders. For first it extendeth to all persons of what quality, or sex soever, the words be [if any]. 2. To all courts of what jurisdiction soever, and whether holden by right or wrong, *in curia Romana, seu alibi*, which word (*alibi*) is a word of a large extent, as before it appeareth. 3. To all things whatsoever. [Where any thing,] which words be as generall as can be. 4. Not only against the king, his crown and dignity, but against the kingdome also: against the king, his crown, and regalty, or realm. 5. This act extendeth not only to procurers, abettors, maintainers, counsellors, &c. which are known words in law, but to favourers, *fautores*, which word was largely extended in the reign of H. 8. whereby it is to be observed how dangerous it is to bring new or unusuall words into any act of parliament, especially into such as be so penned: for there it appeareth that Cliff being a parson of a church granted to the cardinall an annuity, so long as he should be legatē, *ut decentius et sublimius se gereret in auctoritate sua legantina*, which the cardinall had by bull, and paid to him ten marks in name of season, and he was adjudged a *fautor*. But such evasions were found out of this and other statutes, as were made against usurpations and incroachments upon the good and ancient common law, as divers and many statutes were made from time to time to meet with such evasions, which being many, (and others which concern the offence of premunire) we will but name, and leave the reader to peruse the same at large, wherein (as we conceive it) he shall find a great light, by that which hath been said, viz. 25 E. 3. ca. 22. 25 E. 3. Statut. de provisoribus. 38 E. 3. ca. 1, 2, 3, 4. 3 R. 2. cap. 3. 7 R. 2. ca. 12. 12 R. 2. ca. 15. 13 R. 2. Stat. 2. ca. 2. 16 R. 2. cap. 5. 2 H. 4. cap. 3. & 4. 6 H. 4. cap. 1. 7 H. 4. ca. 6. & 8. 9 H. 4. ca. 8. 3 H. 5. cap. 4. 24 H. 8. ca. 12. 25 H. 8. ca. 19, 20, 21. 26 H. 8. cap. 15. 28 H. 8. cap. 10. 35 H. 8. ca. 1. Note, queen Mary repealed all offences made to be in the case of premunire since the first day of the first year of H. 8. but some of them are revived by the statute of 1 El. ca. 1. But in all queen Maries time, the statutes made concerning the offences of premunire before the reign of H. 8. were neither repealed nor altered, but (as hath been said) allowed of in queen Maries time. 1 & 2 Ph. and Mar. ca. 8. 1 El. ca. 1. 5 El. ca. 1. 13 El. cap. 1, 2. 8. 27 El. ca. 2. 21 Jac. ca. 3.

And where the statute of 25 E. 3. de provisoribus provideth, that certain offenders against that act, shall before they be delivered, make full renunciation, &c. because we desire that our student may in all things understand what he reads: it is to be known, that as well before that statute, viz. in the reigns of E. 1. and E. 2. as after, the form of renunciation was to this effect. I renounce all the words comprised in the popes bull to me made of the bishoprick of A. (or the like) the which be contrary, or prejudiciall to the king our sovereign lord, and to his crown, and of that I put myself humbly in his grace, praying to have restitution of the temporalities of my said church, &c. Whereby it may appear what the law was in that case before 25 E. 3. And albeit these laws be very severe, especially against the bulls, &c. of the pope, and forain jurisdiction, and though queen Mary restored his supremacy in such sort as hereafter appeareth, yet would she not repeal the said statutes

tutes of provision and premunire, but provided that they should stand in force. See the statute of 1 & 2 Ph. and Mar. whereby it is enacted, That whosoever should by any proces obtained out of any ecclesiasticall court within this realm, or without, or by pretence of any spiritual jurisdiction, * or otherwise, contrary to the laws of this realm, inquiet, or molest any person, &c. should incur the danger of the act of premunire made in the sixteenth year of the reign of king R. 2. &c. And by another branch in the same act it is enacted, That all bulls, dispensations, and privileges not containing matter contrary, or prejudiciall to the authority, dignity or preheminance royall of the realm, or to the laws of this realm now being in force, and not in this present parliament repealed, may be put in execution. And lastly, by the same act, it is declared and enacted, That neither any thing contained in the body of the said statute, or in the preamble thereof, shall be construed, or expounded to diminish, or take away any of the liberties, priviledges, prerogatives, preheminences, authorities or jurisdictions which were in the imperiall crown of this realm, or belonged to the same before the twentieth year of H. 8. and the popes holines to have such authority, preheminance, and jurisdiction, as his holinesse used, or might lawfully have used by authority of his supremacy the said twentieth year of H. 8. within this realm of England, without diminution or enlargement of the same, and none other. Whereby it appeareth how carefull the state was in queen Maries time to preserve the prerogative of the crown, and the ancient laws of the realm, and did at that time so cautiously restore the supremacy of the pope, *secundum quid*, but not *simpliciter*, and bounded his supremacy within strait and legall limitations, as by the said act appeareth.

1 & 2 Ph. and
Mar. ca. 8.

* Nota.

See the statutes which inflict the punishment of premunire, viz. 2 R. 2. c. 12. 3 R. 2. ca. 3. 7 R. 2. ca. 12. 24 H. 8. ca. 12. 25 H. 8. ca. 19, 20. 1 El. cap. 1. 26 H. 8. cap. 15. 28 H. 8. ca. 16. 1 & 2 Ph. and Mar. cap. 1. 8 El. cap. 1. 5 El. ca. 1. 13 El. ca. 2. 8. 39 El. ca. 18. 27 El. ca. 2. See the fourth part of the Institutes, cap. Chancery, the articles at large against Cardinall Woolsey, artic. 7.

We have been the longer concerning cases of premunire, First, for that they be matters of great weight, and necessary to be known, and we wish that the offence may never be committed. And secondly, for that master Stanford hath in effect but named a premunire.

Stan. pl. cor. 44.
f.

C A P. LV.

OF PROPHECIES.

33 H. 8. cap. 14.

1 E. 6. cap. 12.

Nota.

1 Mar. stat. unicum, Sessione prima.

5 Eliz. cap. 15.

Mitius impetranti melius paratur.

* Nota.

The like act was made, 3 & 4 E. 6. ca. 15. expired.

PROPHECIES upon declaration of armes, fields, names, cognifances, or badges, were made felony without the benefit of clergy: but this act is twice repealed by generall words of all felonies made by any statute since the first year of H. 8.

In anno 5 Eliz. a more moderate statute was made against prophecies by writing, finging, or other open speech, or deed, by the occasion of any armes, fields, beasts, badges, or other like things accustomed in armes, cognifances, or signets; or by reason of any time, year, or day, name, bloodshed or warre, * to the intent thereby to make any rebellion, insurrection, dissention, losse of life, or other disturbance within this realm, or other the queens dominions. For the first offence, imprisonment of his body by the space of a year without baile, and forfeit to the queene and informer, ten pound. And for the second offence imprisonment during life without baile, and forfeit to the queen all his goods and chattels, reall and personall: but he must be therefore impeached or accused within six moneths next ensuing the offence by him done. A just and necessary limitation, and the rather, for that the offence may be committed by bare words. This offence is to be heard and determined before justices of assise, justices of oier and terminer, and justices of peace.

See hereafter the chapter of Newes, and the second part of the Institutes, W. 1. cap. 33. He that hath read our histories shall finde, what lamentable and fatal events have falne out upon vain prophecies carried out of the inventions of wicked men, pretended to be ancient, but newly framed to deceive true men: and withall, how credulous and inclinable our countrey men in former times to them have been, we will set down the truth concerning the same.

Certaine it is, that to foretell of things to come, is a prerogative appropriated to the Holy Ghost; and that the devill cannot *prædicere*, foretell of things to come, which notwithstanding, S. Austin did sometime hold that he could. But afterwards justly retracted it in these words, *Rem dixi occultissimam audaciore assertione, quam debui, &c. certissimum est daemones non præscire.*

Now for the predictions and foretellings of the Sibyls being Gentiles, so long before the incarnation of our Saviour Christ; and more directly and particularly, of those high mysteries of the incarnation and passion of Christ, the coming of Antichrist, the subversion of Rome, and the end of the world, they are by the true prophets of Almighty God, who spake by the Holy Ghost, well discovered; that while the church was in her cradle, these predictions were invented and fathered upon the Gentiles; to the intent to make the doctrine of the said high mysteries of the gospel the more credible amongst the Gentiles. And if any such predictions had been by the said Sibyls, out of question those great lights of nature amongst the Gentiles, Plato, Aristotle, Theophrastus, or some

August. in lib. Retract.

some other of those great philosophers, that with great alacrity dived into the secrets of all kinds of learning, would have found them out, and made some mention of them. But besides the said^a discovery, such predictions by the Gentiles and heathen persons are^b against the word of God.

Also predictions either of the time or end of the world, or that it is at hand, is not lawfull. For the first, ^c see the first of the Acts, It is not for us to know the times and seasons which the Father hath put in his own power, &c. For the second, see the second epistle to the Thessalonians. I beseech you brethren, &c. that you be not shaken in mind, or troubled, &c. as though the day of Christ were at hand, let no man deceive you by any means.

We have the rather said hereof thus much, for that we have heard divers men boldly and confidently upon their numerall calculation to have erred herein.

^a Casaubone
Exercit. 1. ad ap-
paratum Anna-
lium, cap. 10.
^b Ephes. c. 3.
v. 9. Col. cap. 1.
v. 26. Rom.
ca. 16. v. 25.

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^c Acts ca. 1. v. 7.
Mat. 24. 36.
Mark 13. 32.
2 Thess. c. 2.
v. 1, 2.

C A P. LVI.

O F A P P R O V E R.

A P P R O V E R, or approver, in Latin *probator*, is a person indicted of treason or felony in prison for the same, and not disabled to accuse: he may^a upon his arraignment, before any plea pleaded and before competent judges^b confesse the indictment, and take a corporall oath to reveale all treasons and felonies, that he knows, and pray a coroner, before whom he is to enter his appeale or accusation against all those that are *participes criminis*, or of his society in committing of treason or felony contained in the indictment, those partners being within the realme: and if upon his appeale^c all those partners be convicted, the king *ex merito justitiæ*, is to pardon him. But it is in the discretion of the court, either to suffer him to be an approver, or after his approvement to respite judgement and execution, untill he hath convicted all his partners.

A prover.] ^a He is by Bracton called *probator*, by Britton, *provor*, by the Mirror *provor* and *approver*: and his name putteth him in minde of his duty, viz, to prove and approve his accusation or appeale in every point, for^c any fayler of truth disableth him *in omnibus*. And as he must affirme the truth, and the whole truth, before the coroner in his appeale: so in the rehearfall of the appeale before the justices, it must agree with the appeale, 26 Ass. p. 19. and Bracton *ubi supra*. ^f In one record I finde him called *appellator*.

Person.] This extendeth not to a peer or a lord of parliament, for it is against Magna Carta, cap. 29. for him to pray a coroner.

^e A man attainted of treason or felony cannot become an approver, because (as the book saith) he is *hors de la ley*. Also though he be indicted, yet if he be out of prison, he cannot approve.

Parl. 28. E. 1. ca.
Nota, for con-
fronting.
^a 9 H. 5. cor.
440. 21 E. 3. 18.
19 H. 6. 47.
2 H. 7. 3.
12 E. 4. 10.
3 H. 6. 50, 51.
^b 1 H. 5. cor.
441. 3 H. 6. 50,
51. in bank le-
roy. Pasch. 2.
H. 4. coram
rege pl. 6.
^c 21 H. 6. 29.
b. & 34. b.
^d Bract. lib. 3.
fo. 122. b. &
152, &c.
Britton. fo. 7.
11. 17. 48.
Mir. cap. 1. §
13. cap. 3. exec.
al provors,
cap. 5.
^e 25 E. 3. 42.
21 H. 6. 34.
22. E. 3. cor.
460. 26. Ass.
p. 19.
^f Pasch. 2 H. 4.
coram rege. 6.
^g 11 Ass. pl. 17.
21 E. 3. 18.

19 E. 2. cor. 387. 19 E. 3. ibid. 443. 17 E. 3. 13.

^h Mir. ca. 1. §
13. Stanf. pl.
cor. 140. d.

¹ 40 Aff. 39.
¹⁵ E. 3. cor. 113.
¹¹ H. 7. 5.

^k 25 E. 3. 39.

¹ 8 H. 5. cor.
442.

^m 19 H. 6. 4.
¹² E. 4. 10.
⁶ H. 6. cor. 131.
¹⁹ E. 2. cor.
387.

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^a 6 H. 6. ubi sup.
²¹ E. 3. fo. 18.
^{V.} 3 H. 6.
51, 52.
^b Bract. ubi sup.
⁹ H. 4. 1.
² H. 4. 19.
⁴⁴ E. 3. 44.
^{Lib.} 10. fo.
76. b.
¹² E. 4. 10.
²¹ H. 6. 34, 35.

⁴⁰ Aff. 39.
¹⁰ E. 4. 14.

¹ E. 3. 17.
¹ Aff. p. 2.

²⁶ Aff. 19.
⁸ H. 5. cor. 459.
²¹ H. 6. 34.
¹² E. 4. 10.

^{Mich.} 39 E. 3.
coram rege Rot.
97. Suff.

⁷ E. 3. 7.
¹¹ H. 4. 91. b.
Of battell see
more here, cap.
Single combat,
and the second
part of the Insti-
tutes, Westm. 1.
cap. 40.

* 47 E. 3. 5.

^a The Mirror saith, that women, infants, idiots, lepers, or professors in order of religion, or clerks, or persons attainted of felony, or *non compos mentis*, cannot be approvers: and Stanford added men above the age of 70, or maymed: because some of them cannot take an oath, and none of them can wage battell.

Indicted.] ¹ For in any appeale either by writ or bill the defendant shall not become an approver: and before indictment, no person can approve, because if his approvement be false, no judgement (whatsoever he confessed) can be given against him, unlesse he be indicted, ^k and no judgement can be given against him if his appeale be false, but of the offence contained in the indictment, and so are the books to be understood.

¹ If one be indicted and approve, if after an appeale be sued against him, the approvement ceaseth.

Of treason or felony.] And that is only of that treason or felony that is contained in the indictment, as hath bin said. ^m See Trin. 3 H. 4. Rot. 19. coram rege Hertford. *Probator in duello devicit appellat', de alta preditione, * pro quo devictus suspenditur, decapitatur, et quarteria sua dividuntur, et simile ibid. Anglia.*

In prison.] ^a Albeit he be indicted, yet if he be at large, and not in prison, he cannot approve as before is said.

Competent judge.] ^b As justices of the kings bench, justices of oier and terminer, and of gaole delivery, but not justices of peace, because they have no authority by their commission to assigne a coroner. And by the same reason the lord high steward of England cannot assigne a coroner in case of treason or felony.

Corporall oath.] Though the oath be generall of all treasons and felonies, yet in course of law no approvement can be, but of the offence contained in the indictment as hath been said. And this oath and the accusation of himself make his appeale or accusation of another of the same crime, to amount in law to an indictment.

Particeps criminis.] For it cannot be of another treason or felony then is contained in the indictment.

Within the realme.] For if it be out of the realme, it wanteth triall, and therefore the accusation or appeale not to be allowed.

Ex merito justitiæ.] And the reason is, for that he riddeth the countrey of wicked and hurtfull misdoers: whereby the kings peace is kept, and the subject enjoyeth his own quiet. And therefore the king doth in the meane time give him wages.

A man became an approver and appealed five, and every of them joyned battell with him. *Et duellum percussum fuit cum omnibus, et probator devicit omnes quinque in duello, quorū quatuor suspendebantur, et quintus clamabat esse clericum, et allocatur; et probator perdonatur:* so as the approver did and ought to fight in that case with all the appellees. But if there be two or more approvers against one man of one felony, and he joyne battell with them all, and vanquish the first, he is acquitted against the other. Concerning the proces upon an approvement and other incidents, you may reade in Mr. justice Stanford, which need not here to be rehearsed.

* If the appellee joyne battell, or plead not guilty, and after
the

the king pardoneth the approver, the appellee shall be discharged, and shall not be arraigned at the suit of the king.

Convicted.] The appellee may choose either to wage battell with the approver, or to put himself upon the countrey; and if the appellee be found guilty by verdict, it serveth as well for the approver, as if he had been overcome by battell. And therefore the book in 19 H. 6. 35. is misprinted, or misreported: and the note of Fitzh. in abridging the case, tit. Coron. pl. 6. in the end, is against law. *Vid.* Rot. Parl. 17 E. 3. nu. 36.

Stanf. pl. cor.
142.

19 H. 6. 35. a.
Rot. Parl. 17 E.
3. nu. 36.

C A P. LVII.

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O F A P P E A L S.

OF appeals we have spoken in the first and second parts of the Institutes, and you may reade thereof in my reports, lib. 4. fo. 40, 41, 42, &c. lib. 5. fo. 105. 111. lib. 6. fo. 44. 80. lib. 7. fo. 13. 30. lib. 9. fo. 13. 119. Whereunto we will adde a ^b case which was adjudged in an appeal, where the case, as touching the point of the appeal, was thus. Thomas Burghe, brother and heire of Henry Burghe brought an appeale of murder against Thomas Holcroft, of the death of the said Henry: the defendant pleaded, that before the coroner he was indicted of manslaughter, and before commissioners of oier and terminer, he was upon that indictment arraigned, and confessed the indictment, and prayed his clergie, and thereupon was entred *curia advisare vult*, and concluded, and demanded judgement, if that appeal the plaintife against him ought to maintain: whereupon the plaintife demurred in law. And in this case three points were adjudged by sir Christopher Wray, sir Thomas Gawdie and the whole court.

First, that the matter of the barre had been a good barre of the appeale by the common law, as well as if the clergie had been allowed: for that the defendant upon his confession of the indictment had prayed his clergy, which the court ought to have granted, and the deferring of the court to be advised, ought not to prejudice the party defendant, albeit the appeale was commenced before the allowance of it.

The second point adjudged was, that this case was out of the statute of 3 H. 7. for that the words of that act are.

If it fortune that the same felons and murderers, and accessories so arraigned, or any of them to be acquitted, or the principall of the said felony, or any of them to be attainted, the wife or next heire of him so slaine, &c. may have their appeal of the same death and murder against the persons so acquitted, or against the said principals so attainted, if they be alive, and that the benefit of his clergie thereof before be not had.

First part of
the Institutes.
§ 189, 500, 501.
Second part of
the Institutes, in
Mag. Cart. ca.
34. W. 1. ca. 14.
fo. 460. Cust. de
Norm. cap. 68.
^b Pasch. 20
Eliz. in the k.
bench. Tho.
Holcrofts case,
and after, viz.
Mich. 33. & 34
Eliz. between
Kath. Wrote,
late the wife of
Rob. Wrote, pl.
in an appeale
against Tho.
Wiggs def. co-
ram rege, for the
death of her hus-
band; resolved
again according-
ly.

3 H. 7. cap. 1.

And

And in this case the defendant Holcroft, was neither acquitted nor attainted, but convicted by confession, and the benefit of clergy prayed, as is aforesaid. So as the statute being penall concerning the life of man, and made in restraint of the common law, was not to be taken by equity, but is *casus omissus*, and left to the common law.

As to the third it was objected, that every plea ought to have an apt conclusion, and that the conclusion in this case ought to have beene, *Et petit judicium si prædict. Thomas Holcroft iterum de eadem morte, æ qua semel convictus fuit, respondere compelli debeat*. But it was adjudged that either of both conclusions was sufficient in law: and therefore that exception was disallowed by the rule of the court.

Nota, the ancient law was, that when a man had judgement to be hanged in an appeal of death, that the wife, and all the blood of the party slaine should draw the defendant to execution, and Gascoigne saide, *Issint fuit in diebus nostris*.

Richardus de Crek appellat quinque pro feloniam, et offert disratiocinare per corpus suum contra quemlibet eorum separatim. Ipsi petunt se allocari, quod ubi appellans dicit in appello suo, quod ipsi fregerunt ostium Bracini, et non specificat ex parte domus illius prædictum ostium scitum fuit, et petunt judicium. Et Joh. Wanton unus defendent' defendit feloniam, et totum, et paratus est defendere per corpus suum sicut curia consideraverit. Ricus dicit quod non potest pugnare contra prædictum Johannem eo quod ipse mahematus est in humero suo dextro. Et prædictus Johannes petit judicium desicut prædictus Ricus appellando ipsum optulit disrationare prædictum Robertum versus ipsum tanquam felonem prout cur' consider' per corpus suum, et nullam fecit mentionem de aliquo mahemio, unde petit judicium de appello isto. Et ideo considerat' est tam ad calumpniam prædicti Henr. et aliorum, quàm prædicti Johannis, quod appellum ejus nullum. Set pro rege inquiratur rei veritas, &c.

* There lay an appeal of high treason by the common law either in parliament before the statute of 1 H. 4. ca. 14. or in such of the kings courts as have jurisdiction thereof triable by battail or verdict: and this appeareth by all our ancient authors, and divers records, and see in Bracton, fo. 119. a. What pleas the defendant in the appeal of treason may have, to disable the plaintiff to maintain his appeal, see Fleta ubi supra, and Britton ubi supra.

8 & 29. Fleta lib. 1. ca. 21. The Mirror cap. 2. § 11. Pat. 25 E. 3. part. 1. m. 4. coram rege Rot. 22. &c. 8 H. 6. ca. 10. F. N. B. 115. Lib. Intrat. Rast,

11 H. 4. 11.
Pl. com. 306. b.

Trin. 10 E. 1.
in Banco, Rot.
30. Norff.

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Nota how the conclusion of the appeal of felony ought to be when the plaintiff is mayhemed and cannot make tryall by battail.
* See before c. 1. high treason, fo. 6. 1 H. 4. ca. 14.
Glanv. li. 14. c. 1. Bracton, lib. 3. fo. 118, 119. Britton cap. 16 Mich. 4 H. fol. 122.

C A P. LVIII.

OF TREASURE TROVE.

Thesaurus inventus.

TREASURE trove is when any gold or silver, in coin, plate, or bullyon hath been of ancient time hidden, whereforever it be found, whereof no person can prove any property, it doth belong to the king, or to some lord or other by the kings grant, or prescription.

The reason wherefore it belongeth to the king, is a rule of the common law; that such goods whereof no person can claim property belong to the king, as wrecks, strays, &c. *Quod non capit Christus, capit fiscus.* It is anciently called * *fynderinga*, of finding the treasure. And now let us peruse this description.

Gold or silver.] For if it be of any other metall, it is no treasure; and if it be no treasure, it belongs not to the king, for it must be treasure trove.

It is to be observed, that veyns of gold and silver in the grounds of subjects belong to the king by his prerogative, for they are royall mines, but not of any other metall whatsoever in subjects grounds.

Whereforever.] ^a Whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, ^b house, building, ruines, or elsewhere, so as the owner cannot be known.

Whereof no person can prove any property.] For it is a certain rule, * *Quod thesaurus non competit regi, nisi quando nemo scit qui abscondit thesaurum.*

Of ancient time hidden.] ^d *Est autem thesaurus vetus depositio pecuniæ, &c. cujus non extat modo memoria, adeo ut jam dominum non habeat.*

Belong to the king.] ^e Where of ancient time it belonged to the finder, * as by the said ancient authors it appeareth. And yet I find that before the conquest, *Thesauri de terra domini regis sunt, nisi in ecclesia, vel cæmeterio inveniuntur; et licet ibi inveniatur aurum, regis est, et medietas argenti est medietas ecclesiæ, ubi inventum fuerit, quæcunque ipsa fuerit, vel dives, vel pauper.*

By the kings grant or prescription.] 21 H. 6. tit. Prescription. 4. 22 E. 3. cor. 241. 1 H. 7. 33. 9 H. 7. 20. 46 E. 3. 16. Stanf. pl. cor. 39. b. lib. 5. fo. 109. b.

The punishment of him that concealeth, &c. it.] It appeareth by Glanvill, and Bracton also, that *occultatio thesauri inventi fraudulosa* was such an offence, as was punished by death. But it hath been resolved, that the punishment for concealment of treasure trove, is by fine and imprisonment, and not * of life and member.

authors agree thereunto. ^c Glanv. li. 1. c. 1. li. 14. ca. 2. 8 E. 2. Cor. 436. 22 Glanvil, ubi sup. Bracton and the other authors ubi supra. * 22 Aff. p. 99.

Custum. de Nor. ca. 18.

* Inter leges H. 1. ca. 11.

Pl. Com. in case de Mines per totum.

Vid. Bract. li.

2. fo. 222. *Auri fodina, et argenti fodina.*

Fleta, lib. 4. ca.

19. Rot. Parl. 3

R. 2. nu. 42.

27 Aff. p. 19.

^a Bract. 1. 1. fo.

10. li. 3. 120.

Britton, fo. 3. b.

7. b. 26. b. 71. b.

Mir. ca. 1. § 3.

& § 13. ca. 3.

§. 110. Glanv. 1.

1. ca. 1. li. 14.

ca. 2.

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^b In bundell in-

quisit. 32 E. 3.

in Abbathia

Sanctæ Mariæ

Eborum. Bract.

ubi supra. Non

refert in quo loco

hujusmodi the-

saurus invenia-

tur.

^c 22 H. 6. Cor.

446.

^d Bract. ubi su-

pra, and the

other ancient

E. 3. ibid. 241.

The ancient
authors ubi su-
pra, agree here-
unto.

To whom the charge thereof belongeth.] It belongeth to the co-
roner, as appeareth by the statute *de officio coronatoris*, anno 4 E. 1.

C A P. LIX.

OF WRECK.

SEE the second part of the Institutes W. 1. cap. 2, and the ex-
position upon the same.

C A P. LX.

Of False Tokens, or Letters in other Mens
Names.

33 H. 8. ca. 1.

IF any person falsly and deceitfully obtain into his hands any
moneys, goods, chattels, jewels, or other things of any
person or persons, by colour or means of any false or privy
tokens, or counterfeit letters made in any other mans name,
&c. he shall suffer such correction by punishment of his body,
setting upon the pillory, or other corporall pain (except pains
of death) as shall be to him adjudged by the person and
persons before whom he shall be convicted, with a saving
to the party grieved by such deceit, such remedy by way
of action, or otherwise, as he might have had by the common
law.

Here it is to observed, that upon this statute, for this offence the
offender cannot be fined, but corporall pain only inflicted.

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C A P. LXI.

OF THEFTBOTE.

Stat. Wall. anno
12 E. 1. Vet.
Mag. Cart. pt. 2.
fo. 6.

THEFTBOTE (described by act of parliament) *est emenda furti*
capta sine consideratione curiæ domini regis: and so much the word
signifieth, *bote* being taken for amends: *theftbote*, that is, amends
for theft.

See Rot. claus.
an. 1 E. 1. m. 7.
42 Aff. p. 5.

This offence is more then misprision of felony, for that is not a
concealment of his bare knowledge only: but theftbote is when the
owner

owner not only knowes of the felony, but taketh of the thief his goods again, or amends for the same to favour or maintain him, that is, not to prosecute him, to the intent he may escape: but in that case, if he receive the thief himself, and aid and maintain him in his felony, then is he accessory to the felony. And so note a diversity, *quando proprietarius recipit latrocinium, et quando latronem*; But if a man take his goods again that were stolen, it is no offence, unlesse he favour the thief, as is aforesaid.

The punishment of theftbote is ransome and imprisonment: and seeing the punishment of theftbote, which is greater then concealment of felony, is but ransome and imprisonment, it standeth with reason, that the punishment of * misprision of felony should be but fine and imprisonment. Theftbote is sometimes taken *pro ipso latrocinio*, for the thing itself stolen from you.

You shall read in ancient authors of redoubbors, addoubors, derived of the French word *addoubeur*, they are in law patchers, botchers, or menders of apparell, that take * theftbote of cloth (and change it into another fashion) and are dwelling out of burghs and cities; because in those days burghs and cities were so well governed, as such offenders were soon discovered: for they were not then commended, for that they were populous, but for that the governors were provident in preventing of offences.

Mir. ca. 2. § 12.
3 E. 3. Cor. 353.
Stanf. pl. coron.
40. b.
42 Aff. ubi supra.

3 E. 3. Cor. 353.

* See before in the chapter of Misprision of Treason, ca. 3.
Mir. ca. 1. §. 17.
Britton, fo. 33.

* That is, stolen cloth.

C A P. LXII.

OF INDICTMENTS.

CONCERNING Indictments we have spoken somewhat in the first part of the Institutes. Sect. 194. 208. And you may read in my Reports many resolutions concerning indictments, viz. lib. 4. fo. 40, 41, 42. &c. lib. 5. fo. 120, 121, 122, 123. li. 7. fo. 5, 6. 10. li. 8. fo. 57. 36, 37. li. 9. fo. 62, 63. 116. 118.

We will add one point adjudged in the case between Burgh and Holcroft before mentioned in the chapter of Appeals, which was, that where it is provided by the statute *de Artic super Cartas*, cap. 3. *En case de mort del home (deins le verge) ou office del coroner appent as views, et enquests de ceo faire, soit maunde al coroner del pais que ensemblement ove le coroner del hostel le roy face l'office que appent, &c.* And in that case one man was coroner both of the kings house, and of the county, and the indictment of manslaughter was taken before him as coroner both of the kings house, and of the county. And it was adjudged that the indictment was good, because the mischief expressed in the statute was remedied, as well when both offices was in one person, as when they were in divers: and therefore in this case the rule did hold, *Quando duo jura concurrunt in una persona, æquum est, ac si esset in diversis*.

Richard Weston, yeoman, late servant of Sir Gervase Elwys, lieutenant of the Tower, and under the lieutenant, keeper of Sir Thomas Overbury then prisoner in the Tower, was indicted: for that he the said Richard the 9 day of May an. 11. *Ja. regis*, in the

See the 1 pt. of the Institutes, sect. 194, 195.

Holcrofts case.
Artic. super
Cart. ca. 10.
The same was again resolved in Wrots case, ubi supra.

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Sir Tho. Overburys case.
Mich. 13 Jac.
See before, ca. 7.
Of murder more of this case.

the Tower of London, gave to the said Sir Tho. Overbury poyson called roseacre in broth, which he the said Sir Thomas received. *Et ut idē Rich. Weston præfatum Tho. Overbury magis celeriter interficeret et murraret, 1 Junii anno 11 Ja. regis supradicti.* gave to him another poyson called white-arsenick, &c. and that 10 Julii an. 11. *suprad.* gave to him a poyson called mercury sublimat' in tarts, *ut prædicti Tho. Overbury magis celeriter interficeret et murraret:* and that a person unknown in the presence of the said Richard Weston, and by h's commandment and procurement, the 14 of Septemb. anno 11. *supradicti.* gave to the said Sir Thomas a glyster mixt with poyson called mercury sublimat', *ut prædictum Thomam magis celeriter interficeret et murraret. Et prædictus Thomas Overbury de sepe-ralibus venenis prædictis et operationibus inde, à prædictis sepe-ralibus temporibus, &c. graviter languebat usque ad 15 diem Septemb. anno 11. supradicto, quo die dictus Thomas de prædictis sepe-ralibus venenis obiit venenatus, &c.* And albeit it did not appear of which of the said poysons he died, yet it was resolved by all the judges of the kings bench, that the indictment was good; for the substance of the indictment was, whether he was poysoned or no. And upon the evidence it appeared, that Weston within the time aforesaid had given unto Sir Thomas Overbury divers other poysons, as namely the powder of diamonds, cantharides, lapis causticus, and powder of spiders, and aqua fortis in a glyster. And it was resolved by all the said judges, that albeit these said poysons were not contained in the indictment, yet the evidence of giving them was sufficient to maintain the indictment: for the substance of the indictment was (as before is said) whether he were poysoned or no. But when the cause of the murder is laid in the indictment to be by poyson, no evidence can be given of another cause, as by weapon, burning, drowning, or other cause, because they be distinct and several causes: but if the murder be laid by one kind of weapon, as by a sword, either dagger, styletto, or other like weapon is sufficient evidence, because they be al under one classis or cause. And afterwards, Ann Turner, Sir Gervase Helwys, and Richard Franklyn a physitian, (purveyor of the poysons) were indicted as accessories before the fact done: And it was resolved by all the said judges, that either the proofs of the poysons contained in the indictment, or of any other poyson were sufficient to prove them accessories: for the substance of the indictment of them as accessories was, whether they did procure Weston to poyson Sir Thomas Overbury: and because that not only Ann Turner, and Richard Franklyn, but some of the degree of nobility were indicted as accessories in another county, viz. in the county of Midd. divers notable points were resolved upon the statute of 2 E. 6. First, if the accessory be in the county of Midd. where the kings bench is, and the principall did the felony, &c. in another county, that the court of the kings bench is within the words of that act, viz. (and that the justices of gaol-delivery, or oier and terminer, or two of them, &c.) for the causes and reasons given in the lord Zanchers case, lib. 9. fo. 117, 118. &c. Secondly, if the indictment be taken in the kings bench, then the justices shall not write in their own names, *quia placita sunt coram rege.* Thirdly, divers presidents were shewed where the accessory was in the county of Midd. where the kings bench sat, and the principall was attainted in another county, that the

Vid. li. 9. fo. 67.
Mackallies case
acc.

2 E. 6. cap. 24.

the justices of the kings bench have removed the record of the attainder of the principall before them by *certiorari*, and so it was done in the lord Zanchers case, *ubi supra*. The like president was shewed in a case where the principall was attainted in the county of Oxon, and the accessory was in Midd. and the kings bench sitting there, the justices of the same court removed the attainder before them by *certiorari*. Fourthly, it was resolved, that the lord steward of England, who is a judge in case of high treason, or felony committed by any of the peers of the realm, is within these words, justices of gaol-delivery, or oier and terminer, because he is a justice of oier and terminer, for his authority is by commission, and the words of his commission be after divers recitals, *Et superinde, audiend', examinand', et respondere compellend', et sine debit' terminand'*: so as he hath power to heare and determine. And where the words be [or any two of them] that is to be intended, where there be two or more justices, and yet where there is but one, it extendeth to him. As the statute of Merton, cap. 3. power being given to the sheriffe in case of redisseisin, the words be, *assumptis tecum coronatoribus placitorum coronæ, &c.* in the plurall number. And yet where there is but one coroner in the county the statute extends thereunto, and the sheriffe shall take that one. Also the words of the statute are further, That then the justices of gaol-delivery or oier and terminer, or other there authorized: within which words, [or other there authorized] the lord steward is included. Fifthly, if the record of the attainder were by writ of *certiorari* removed out of London into the kings bench, then there arose another doubt upon the said statute, if afterward any proceeding should be had against any peer, for that the words of the statute be, The justices, &c. shall write to the custos rotulorum or keeper of the record where such principall shall hereafter be attainted; and the attainder in this case was in London, and the kings bench was in Middlesex: so as if the record should be removed into the kings bench in Middlesex, the record should not be where the attainder was had; and consequently, the lord steward could not write to the kings bench. And therefore to prevent all questions, it was resolved, that in this case of the lord steward, no *certiorari* should be granted, but a speciall writ should be directed according to the words of the said act to the commissioners of oier and terminer in London, to certifie whether the principall was convict or acquitted: and they made a particular certificate accordingly, so as the record of the attainder of the principall, did notwithstanding that certificat, remain with the commissioners of oier and terminer in London; so as if any further proceeding should be had, the lord steward might write to them, as after he did in the case of R. earl of S. and F. his wife.

And it is to be observed, that the ancient wall of London (a mention whereof doth yet remain) extended through the Tower of London; and all that which is on the west part of the wall, is within the city of London, viz. in the parish of All Saints Barking, in the ward of the Tower of London: and all that is on the east part of the wall is in the county of Middlesex; and the chamber of Sir Thomas Overbury was within the Tower on the west part of the said wall, and therefore Weston was tried within the city of London.

And

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39 H. 6. 42.
23 Aff. p. 7.

^a Mag. Cart. ca. 29. 5 E. 3. ca. 9. 25 E. 3. c. 4. stat. 5. 28 E. 3. ca. 3. 37 E. 3. cap. 18. 38 E. 3. cap. 9. 42 E. 3. cap. 3. ^b Rot. claus. 18 H. 3. m. Rot. Parl. 15 E. 3. nu. 9, 10. & 15. 42 E. 3. nu. 29. Sir John A Lees case. 17 R. 2. nu. 37. 2 H. 4. nu. 60.

^c 7 E. 3. fo. 26. 50. Vide 6 E. 3. fo. 33. & 8 E. 3. 30. 26 E. 3. 74. tit. Rescous 21. 43 E. 3. 32. per Knivet. 2 E. 3. fo. 7. John de Britains case, 3 E. 3. 19. 45 E. 3. Decies tantum 12. ^d 5 E. 2. Quar. Imp. 167. 33 E. 3. Bre. 916. ^e 17 E. 3. 50. 74. F. N. B. 48. f. 13 E. 3. Jurisd. 23. ^f 42 E. 3. 26. F. N. B. 107. D. ^g 19 H. 6. 47. 34 H. 6. 3. &c. ^h 39 H. 6. 26. 1 H. 4. 1. 15 E. 3. Corody 4. ⁱ Regist. fo. 165. a. F. N. B. fo. 7. b. 21 H. 3. Bre. 882. Britton fo. 28. b. cap. 18. ^k 16 E. 3. Bre. 651.

And where it is often said in many ^a acts of parliament, ^b records, and ^c book cases, that the king cannot put any man to answer, but he must be apprised by indictment, presentment, or other matter of record. True it is, in pleas of the crown or other common offences, nuisances, &c. principally concerning others, or the publick, there the king by law must be apprised by indictment, presentment, or other matter of record: but the king may have an action for such wrong as is done to himselfe, and whereof none other can have any action but the king, without being apprised by indictment, presentment, or other matter of record, as a ^d *quare impedit*, ^e *quare incumbravit*, a writ of ^f attain, ^g of debt, ^h detinue of ward, ⁱ escheat, ^k *scire fac. pur repealer patent*, &c.

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C A P. LXIII.

Of Councill learned in Pleas of the Crowne.

See before cap. 2. Petit Treason. fo. 29. 34. 9 E. 4. 22. Stanf. pl. cor. 151. b. otherwise it is in an appeale which is the suit of the party.

WHERE any person is indicted of treason or felony, and pleadeth to the treason or felony, not guilty, which goeth to the fact best known to the party; it is holden that the party in that case shall have no councill to give in evidence, or alleage any matter for him: but for as much as *ex facto jus oritur* it is necessary to be explained, what matters upon his arraignment, or after not guilty pleaded, he may alleage for his defence, and pray councill learned to utter the same in forme of law.

1. And first upon the arraignment what advantage he may take in case of high treason by the common law. If it be for compassing the death of the king, he may alleage, that in the indictment there is no such overt or open act set down in particular, as is sufficient in law or the like. For it is to be observed, that in no case the party arraigned of treason or felony, can pray councill learned generally, but must shew some cause.

2. Secondly, in case of high treason by force of any statute, he may alleage, that the indictment being grounded upon a statute, the statute is either mistaken or not pursued.

3. Thirdly, of what matters he may take advantage equally concerning them both. He may alleage, that there was not at the time of the indictment of high treason, two lawfull accusers, that is, two lawfull witnesses.

4. Fourthly, of what matters he may generally take advantage in all cases of treason and felony. He may alleage, that the offence is not certainly alleaged in respect of the matter, time, and place, or that he

1 E. 7. 22.

he is not rightly named, or have not a right addition, or that the offences were done before the last generall pardon.

Fifthly, after he hath pleaded not guilty, what advantage he may take upon the evidence: he may alleage, that he ought to have two lawfull witnesses in case of high treason to prove the fact against him.

Sixthly, he may take advantage in arrest of judgement, if the verdict be found against him, that the triall came not out of the right place: as it fell out in Arundels case, convicted by a jury of wilfull murder; he informed the court that the jury that tried him came out of a wrong place, and thereupon he had counsell learned assigned him; who indeed found, that the *venie facias* was mis-awarded, and the court thereof by the counsell being informed, judgement was stayed. And that the prisoner may alleage these or the like matters, it is evident, because for every matter in law rising upon the fact, the prisoner shall have counsell learned assigned him. Also it is lawfull for any man that is in court, to informe the court of any of these matters, lest the court should erre, and the prisoner unjustly for his life proceeded with. And the reason wherefore regularly in case of treason and felony, when the party pleads not guilty, he was to have no counsell, was for two causes. First, for that in case of life, the evidence to convince him should be so manifest, as it could not be contradicted. Secondly, the court ought to see, that the indictment, triall, and other proceedings be good and sufficient in law; otherwise they should by their erroneous judgement attaint the prisoner unjustly.

Robert Chirford counselled the prior of the priory of Bingham in Norfolke, that John of Leicester the kings serjeant at armes, comming to the priory with the kings writ of privie seale, should not be admitted to the priory: for which counsell he was indicted in the kings bench, and depending the proces upon the indictment, the king doth pardon him: and in the pardon is contained a *supersedeas* to the justices, commanding them to proceed no further.

5.

6.

Lib. 6. fo 14.
Arundels case.

9 E. 4. 22.

Stanf. ubi sup.
7 H. 4. 34, &c.
See before fo. 19.

Rot. claus.
14 E. 2. 17.
27 Octob.

C A P. LXIV.

[138]

Of Principall and Accessory.

ALBEIT justice Stanford hath well collected the books concerning principall and accessory, yet *diversa desiderantur*: and necessary it is, that some things touching the same should be added, which are very necessary to be knowne.

It is a sure rule in law, that *in alta proditiōe nullus potest esse accessorius, sed principalis solummodo*. This rule being well understood, will open the reason of divers cases, which yet are involved in darknesse.

High treason is either by the common law, or by act of parliament: we will set downe examples (which ever do illustrate) of both.

I H. INST.

M

A. doth

Mich. 12 & 13
Eliz. 296. Dier,
Coniers case.

A. doth counterfeit the kings coine, viz. shillings, and C. knowing the same doth receive A. and comfort and aide him: this counterfeiting is high treason by the common law in A, as hath been said: and yet it hath beene holden that in this case C. hath not committed treason: for say they, in case of felony, a receiver of a felon after the felony done, knowing him to be a felon, is no principall, but an accessory: and for that there is no accessory in treason, therefore C. in the case before committeth no treason; for then in judgement of law he must be a counterfeiter of the kings coine within our statute of 25 E. 3. which he is not: and therefore they say, this is *casus omissus*, and not within any of the classes or heads of the said act of 25 E. 3. But all agree, that procurors of such treason to be done before the fact done, if after the fact be done accordingly, in case of treason, are principals, for that they are *participes criminis* in the very act of counterfeiting.

^a 19 H. 6. 47.
³ H. 7. 10.
Stanf. fo. 3. See
before cap. Treason.
Verb. Si
homo counter-
face le grand
seale.

^b Pasch. 4. Jac.
Abingdons case
resolved by the
justices.

^c M. 12 & 13 El.
ubi supra.
See before ca. 3.
Of Misprision of
Treason.

^d 7 H. 4. 27.
21 E. 4. 71.
13 H. 7. 10.
Pl. com.

Lib. 4. fo. 42. in
Heydons case.
Lib. 9. fo. 67.
Mackallies case.
& lib. 11. fo. 5.

^e Lib. 4. fo. 44.
Vauxes case.

Pl. com. fo. 474.
Saunders case.

Lib. 9. 81. Ag-
nes Gores case.
See Pasch. 32.

E. 3. coram
rege rot. 62. Ph.
Cliftons case.

^f 25 E. 3. 39. b.
cor. 126.

26 Ass. 47.

9 H. 4. 1.

7 H. 6. 42.

*[139]

^a 26 Ass. ubi
sup.

^b Mic. 7 R. 2.
coram rege rot.
23. Cant.

7 H. 4. 27.

^a But saving reformation we hold, that if any man committeth high treason, and thereby becommeth a traytor, if any other man knowing him to be a traytor, doth receive, comfort, and aide him, he is guilty of treason, for that there be no accessories in high treason. ^b And so it was resolved in the case of Abingdon, who received, comforted, and aided Henry Garnet superior of the jesuits, knowing him to be guilty of the powder treason, and accordingly Abingdon was indicted and attainted of high treason.

^c And where it is said, that the said offence in Conyers case was misprision of treason, that cannot be, because there was a consent, and not a concealment only: otherwise, high treason being the highest offence, should have more favour, then felony: for the receiver and comforter in case of felony is punished by death, and so is not he that committeth misprision of treason. And lastly, this is no new treason, but a partaking and a maintaining of the old.

In case of felony there are principals and accessories, and accessories be of two sorts, either before the offence be committed, or after. See the second part of the Institutes, W. 1. cap. 14. And concerning this, there be also certaine rules, ^d *Nullus dicitur felo principalis, nisi actor, aut qui praesens est abettans, aut auxilians actorem ad feloniam faciendam.* But this rule hath his exception: for ^e in case of poysoning, if one layeth poyson for one, or infuse it into broth, or the like, albeit he be not present when the same is taken; and either the party intended, or any other is poysoned, yet is he a principall: and in that case, both the principall and procurer, or accessory may be absent. See the bookes aforesaid for accessories before the felony committed, and where and in what manner the procurement shall be said in law to be pursued: the learning whereof is so plainly set downe, as the same need not herein to be repeated. ^f *Nullus dicitur accessorius post feloniam, sed ille qui novit principalem feloniam fecisse, et illum recepit * et confortavit.* ^a And therefore if a man write letters for his deliverance, or in favour of him, or the like; he is no accessory, for that he received not the felon.

^b A vicar, which instructed an approver which could not reade, whilst he was in prison, to reade, whereby he escaped, was adjudged no accessory to the felony.

Catlyn

Catlyn and Browne justices of assise in the county of Suffolke put this case to all the judges. ^c A man committed felony in the county of Suffolke, for which he was committed to the gaole; and R. an attorney advised the friends of the felon to perswade the witnesses not to appeare to give evidence against him, which was done accordingly. And it was resolved, that neither the friends nor the attorney were accessaries to the felony, but that it was a great contempt and misprision, for which they might be fined and imprisoned.

^c M.c. 11 & 12
El. the case of
Roberts the at-
torny.

^d The accessory cannot be guilty of petit treason, where the principall is guilty but of murder. For *accessorius sequitur naturam sui principalis*. ^d See before cap. Petit Treason.

^e If divers commit any murder, or other felony, one man may be both principall and accessory to the other. ^e 7 H. 4. 27.

See before cap. Clergie, that if the principall before attainder hath his clergie, the accessory is discharged. And note generally, where the principall before attainder is pardoned, or his life otherwise saved, the accessory is discharged. ^f 2 H. 4. 16.

C A P. LXV.

Of Misprisions divers and severall: and first of Misprision of Felony, &c.

OF misprision of treason we have already spoken, and of the etymologie of the word. It remaineth now that we speak of other misprisions.

Misprision is twofold: one is *crimen omissionis*, of omission, as in concealment, or not discovery of treason or felony: another is *crimen commissionis*, of commission, as in committing some heynous offence under the degree of felony.

Or misprision is of two sorts, viz. passive and active: passive is of the nature of concealment, whereof some be by the common law, and some by statute. By the common law, as passive misprision, that is concealment of high treason whereof we have spoken; and passive misprision, that is concealment of felony, whereof we are now in this chapter to speak. Some by statute: as if any be moved to make commotion or unlawfull assembly, and do not within twenty four houres declare the same to a justice of peace, sheriffe, maior, or bailiffe, &c. concealment by juries, 3 H. 7. ca. 1. 33 H. 8. ca. 6, &c.

¹ Mar. 1. Parl.
ca. 12.

¹ Eliz. cap. 17.
See the second
part of the In-
stitutes. W. 1.
cap. 9.

Now are we speak of concealment or not discovery of felony. As in case of high treason, whether the treason be by the common law, or statute, the concealment of it is misprision of treason. So in case of felony, whether the felony be by the common law, or by statute, the concealment of it is misprision of felony.

If any be present when a man is slaine, and omit to apprehend the slayer, it is a misprision, and shall be punished by fine and imprisonment. ⁸ E. 2. cor. 395.

And as the concealment of high treason is higher by many degrees then the concealment of felony, so the punishment for the concealment of the greater is heavier then of the lesser, and yet

W. 1. ca. 9. See
the exposition
thereof, ubi sup.

the concealment of felonies in sheriffs, or bailiffs of liberties is more severely punished then in others, viz. by imprisonment by one year, and ranfome at the will of the king. From which punishment * if any will save himself he must follow the advice of Bracton, to discover it to the king, or to some judge or magistrate, that for administration of justice supplieth his place, with all speed that he can.

Bract. lib. 3. fo.
118. 2.

Non enim debet morari in uno loco per duas noctes, vel per duos dies, nec debet ad aliqua negotia, quamvis urgentissima, se convertere, quia vix permittitur ei ut retrospiciat.

And this is intended of a concealment, or not discovery of his meer knowledge: for if in case of high treason, he that knoweth it, before it be done, and assenteth to it, is *particeps criminis*, and guilty of treason: and in case of felony, he that receiveth the thief, and assenteth to it, is accessory.

See before the
chapt. of Mis-
prision of Treason,
fo. 36. and
of Principall and
Accessory, fo.
138.

* Ecclesiastes.
ca. 10. v. 20.

See before in the chapter of misprision of treason, that every treason and felony doth include in it misprision of treason and felony. See the statute of 23 El. ca. 1. of misprision, that is, *crimen commissionis*.

Compassings, or imaginations against the king, by word, without an overt act, is an high misprision, as before is said. * *In cogitatione tua ne detrahas regi, &c. quia aves cæli portabunt vocem tuam, et qui habet pennas annuntiabit sententiam.*

a See the second
part of the In-
stitutes, W. 1.
ca. 33.
25 E. 3. ca. 1.
It is high treason
to kill any of
them in their
places.

b 22 E. 3. 13.
19 E. 3. Judg-
ment 174.
Mich. 6 E. 3.
coram rege
Rot. 55. Ebo-
rum.

c 41 E. 3. cor. 280.
Nota the for-
feiture of his
lands is but du-
ring his life.

41 E. 3. 25.

d Int. leges Al-
veredi, cap. 34.
3 El. Dier, 188.
2 Ja. Belling-
hams case co-
ram rege with
his elbow and
shoulder.

e 33 H. 8. ca. 12.

a If any man in Westminster hall, or in any other place, sitting the courts of chancery, the exchequer, the kings bench, the common bench, or before justices of assise, or justices of oier and terminer, (which courts are mentioned in the statute of 25 E. 3. *De preditionibus*) shall draw a weapon upon any judge, or justice, though he strike not; this is a great misprision, b for the which he shall lose his right hand, and forfeit his lands and goods, and his body to perpetuall imprisonment: the reason hereof is, because it tendeth *ad impedimentum legis terræ*. c So it is, if in Westminster hal or any other place, sitting the said courts there, or before justices of assise, or oier and terminer, and within the view of the same, a man doth strike a juror, or any other with weapon, hand, shoulder, elbow, or foot, he shall have the like punishment; but in that case, if he make an assault, and strike not, the offender shall not have the like punishment.

d If any strike in the kings palace, where the kings royall person resideth, he shall not lose his right hand, unlesse he draw blood; but if he draw blood, then his right hand shall be stricken off, he perpetually imprisoned, and fined and ransomed.

Note the law makes a great difference between a stroke or blow, in or before any of the said courts of justice, where the king is representatively present, and the kings court, where his royall person resideth. For in the kings house (as hath been said) blood must be drawne, which needeth not in or before the courts of justice, but a stroke only sufficeth. Again, the punishment is more severe in the one case, then in the other: such honour the law attributeth to courts of justice, when the judges or justices are doing of that which to justice appertaineth: and the reason is, *Quia justitia firmatur solium*.

But note that by the ancient laws of this realm, striking only in the kings court was punished by death. *Vide Lambard inter leges Inæ ca. 6. Si quis in regia pugnarit, rebus suis omnibus mulctator, et sine morte etiam plectendus, regis arbitrium et jus esto. Inter leges Canuti,*

nuti, cap. 56. Si quis in regia dimicarit, capitale esto, &c. Inter leges Alveredi, cap. 7. Qui in regia dimicarit, ferrumve distrinxerit, capitor, et regem penes arbitrium vitæ necisque ejus esto, &c.

^c Peter Burchet prisoner in the tower, stroke within the tower John Longworth his keeper (who stood in a window reading of the Bible) with a billet on the head behind, whereby blood was shed, and death instantly ensued: this being without any provocation was adjudged murder, for which he was attainted, and before his execution (which was in the Strand over against Somerset house) his right hand was first stricken off, by force of the statute of 33 H. 8. for that the tower was one of the queens standing houses or palaces.

The kings palace at Westminster hath this liberty and priviledge, viz. *Nullæ citationes, aut summonitiones, liceant fieri cuicunque infra palatium regis Westm.*

Like priviledge hath Westminster hall, or other place, where the kings justices, &c. sit, as by these following records appeareth.

^a *Quia bedellus universitatis citari fecit Wil. de Wivelingham infra ostium aulae Westm. justiciariis sedentibus, ad comparand' coram cancellario, &c. pro quo se posuit in gratiam regis, committitur gaolæ, et Henricus de Harwood, ad cujus sectam persecutus fuit, committitur marischal. et finem fecit 40. s.*

^b *Matilda de Nyerford, filia Willielmi de Nyerford militis defuncti, did libell against John earl of Warren, and* ^c *Johan de Barro countes of Warren the kings niece (in camitina dominæ reginæ consortis domini regis) in a cause of matrimony and divorce, and the same Johan de Barro was cited in the kings palace at Westminster, &c. It was upon full examination of the cause, adjudged in parliament in these words, Quod prædictum palacium domini regis est locus exemptus ab omni jurisdictione ordinaria, tam regie dignitatis et coronæ suæ, quam libertatis ecclesiæ Westm', et maximè in præsentia ipsius domini regis tempore parliamenti sui ibidem: ita quod nullus summonitiones, seu citationes ibidem faciat, et præcipuè illis, qui sunt de sanguine domini regis, quibus major reverentia, quam aliis fieri debet, &c. Consideratum est, quod officiar' committatur turri London, et ibidem custodiatur ad voluntatem domini regis.*

Here two things are principally to be observed: first, that this royall priviledge is not only appropriated to the palace of Westminster, but to all the kings palaces, where his royall person resides. Secondly, that this priviledge is to be exempted from all ecclesiasticall jurisdiction, *regie dignitatis et coronæ suæ ratione, &c.*

If any doe rescue a prisoner in or before any of the abovesaid courts committed by any of the aforesaid justices, it is a great misprision, for which he and the prisoner assenting to it, shall forfeit their lands and goods, and their bodies to perpetuall imprisonment, but shall not lose his hand, because no stroke or blow was given.

But it was resolved by all the judges, that where Thomas Oldfield, sitting in the court of the dutchy of Lancaster, with a knife stabbed one Ferror a justice of peace in the view of the said court, that the court of the dutchy was none of the courts to make it a misprision to lose his right hand, &c. but the offender was to be indicted, and grievously fined.

And in 9 El. one Guirling stroke another in the Whitehall, sitting

^c Mich. 15 El. in the case of Peter Burchet esquire of the Middle Temple.

Pasch. 8. E. 2. Coram rege Rot. 28 Norff.

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^a Mich. 12 E. 3. Coram rege Rot. 101. Cant.

^b Placita coram domino rege in parlamento suo apud Westm' in præsentia domini regis, an. 21 E. 1.

^c Ellanor daughter of E. 1. married with William earl of Barry alias Barro in France, and had issue the said Johan who married John earl Warren.

22 E. 3. 13.

Trin. 8 Jac. re-
gis Oldfields
case.

Pasch. 9 Eliz.
Guirlings case.

sitting the masters of requests, and it was then resolved by the court of kings bench, that it was not any misprision, for the which he should lose his right hand, &c. but he was indicted and fined.

Hil. 13 E. 3.
Coram rege Rot.
104. Suff.

Quia Thomas de Holbroke manus violentas imposuit super Johannem de Louaham, &c. ad sessionem suam sedentem apud Giptwicum, et eum dementitus est, committitur in parlamento turri London, et finitur 20. li. et invenit sex milites manucaptos pro bono gestu suo.

And where some of the books abovesaid say, that the offender shall forfeit his lands, and some that he shall be disinherited, yet the forfeiture of his lands is only for term of his life, (as before is said :) for being no felony, the blood is not corrupted, nor the heir disabled to inherit. And this severe punishment is at the suit of the king, and the party may have his action, and it shall be tried by the officers and criers. And for such a stroke Thomas of Whittesley recovered five hundred pounds, Trin. 9 E. 3. Rot. 154. Midd.

Trin. 9 E. 3.
Rot. 154. Midd.

Brit. ca. 25. fo.

47.
* Nota for the
dignity of
knights.

Britton saith, *Ascuns trespasses sont nequedent plus punishable, si come trespas fait en temps de peace a * chivaliers, ou auters gents honorables per ribaws, ou auters viles persons; en quel case nous volons, que si ribawe soit atteint al suit de chescun chivalier, que il eyt ferue per felony sans desart del chivalier que le ribawe perd son pome dont il trespassa: so great a respect in those days was had of honour and order. Ribawe is taken here for a rascall ruffian. There is a great misprision when any revenge is sought against a judge, justice, officer, juror, serjeant, counsellor, minister, or clerk, for that, which they doe in discharge of their severall duties, offices, and places, concerning the administration of justice.*

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Mich. 33 & 34
E. 1. Coram re-
ge, Rot. 75.

Roger de Hegham and others being justices of oier and terminer, and sitting in the exchequer chamber, gave judgement for Mary late the wife of William Brewse plaintiff, against William le Brewse defendant, which judgement was pronounced by Roger de Hegham. William de Brewse demanded of Roger de Hegham if he would avow the judgement, and said, Roger, Roger, now thou hast thy will which of long time thou hast sought: of whom Roger de Hegham demanded, What is that? to whom William de Brewse said, My shame, and my losse, and this I will reward or recompence, or I will think of it. Whereof he being indicted and arraigned, and confessing the offence, the record saith, *Et quia sicut honor, et reverentia, qui ministris domini regis ratione officii sui faciuntur, ipso regi attribuuntur; sic dedecus et contemptus ministris suis facti eidem domino regi inferuntur; consideratum est quod præd. Willielmus de Brewse, discinctus in corpore, capite nudo, tena deposita, eat e banco domini regis ubi placita teneritur in aula Westm', per medium aule prædictæ, cum curia plena fuerit, usque ad scaccarium (ubi deliquit) et ibidem veniam petit a præfato Rogero, &c. et postea committitur turri London, ibidem moratur, ad voluntatem regis.*

Nota,

Bract. lib. 2.
105. These
words were given
to the treasurer
of England by
the procurement
of Pierce of
Gaveston.

Note this exemplary judgement against a gentleman of a great and honourable family. *Qualibet pœna corporalis, quamvis minima, major est qualibet pœna pecuniaria.* And in that record it is said, *Quod dominus rex filium suum primogenitum, et charissimum Edwardum principem Walliæ, pro eo quod quædam verba grossa cuidam ministro suo dixerat, ab hospitio suo ferè per dimidium anni amovit, nec ipsum filium suum in conspectu suo venire permisit, quousque dicto ministro de dicta transgressione satisfecerat.*

Quia

Quia Petrus de Scales minatus fuit Ricūm de Worlingworth, qui fuit de consilio Johannis de Moten, de vita et membris, dictus Petrus invenit plegios de b. no gestu suo.

Hil. 20 E. 3.
Coram rege Rot.
160.

There be many records for abusing of jurors, viz. Pasch. 10 E. 3. Coram rege, rot. 87. Gilbertus Twist. Pasch. 26 E. 3. ibidem, rot. 22. Essex, Tho. Hubberd, Hil. 7 H. 5. ibidem, rot. 24. Ricūs Chedde. Mich. 17 E. 2. Coram rege rot. 63.

Percussio clerici curiæ in veniendo versus curiam, &c. Trin. 11 E. 2. Coram rege, rot. 42. London. Not only these particuilar revenges abovesaid, but all other of what kind soever are great misprisions.

Also when any revenge is fought against any man for complaining in any of the kings courts, *super gravaminibus, &c.* for grievances, &c. *Quia deterret homines à querelis super gravaminibus in forma juris. De hiis qui vindictam fecerint, eo quod aliquo modo super prædictis gravaminibus in curia domini regis conquesti fuerunt.*

Cap. Itineris §.
ultimo.

Iusticiarii taxaverunt damna 2 marc' super Willielmum Botesford, eo quod minabatur quandam Harwifiam de vita et membris, eo quod ipsa prosequeretur ipsum in placito transgressionis.

Pasc. 10 E. 3.
Coram rege Rot.
86. Linc.

We will conclude this point for private revenge with an ancient law before the conquest. *Si quis privato consilio illatam sibi injuriam vindicarit, antequam jus æquum sibi dari postulaverit, quod nomine vindictæ eripuit reddito, integrum rei pretium præstato, et 30 solidos de- pendito.*

Inter leges Inæ,
cap. 9. Lamb.
See the 4. part
of the Instit.
cap. Chancery;
Artic. vers. Car-
dinal Woolsey.
Art. 4. 5, 6. 11.
41.

See in the fourth part of the Institutes, cap. Of the chancery, in the articles against Cardinall Woolsey. Artic. 4, 5, 6. 11. 41.

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C A P. LXVI.

OF CONSPIRACIE.

CONSPIRACIE^a is a consultation and agreement between two or more, to appeale, or indict an innocent falsely, and maliciously of felony, whom accordingly they cause to be indicted or appealed; and afterward the party is lawfully acquitted by the verdict of twelve men: the party grieved may be relieved, and the offender punished two wayes. First, by a writ of conspiracy, which is a civill or common action at the suit of the party, wherein the plaintife shall recover damages, and the defendant shall be imprisoned. Secondly, by indictment at the suit of the king, the judgement whereof is criminall: of which we are now to speak.

^b Upon this suit of the king, if the offenders be convicted, the judgement is grievous and terrible, viz. That they shal lose the freedom or franchise of the law, to the intent that he shall not be put or had upon any jury or assise, or in any other testimony of truth: and if they have any thing to do in the kings courts, they shall come^c *per solem, id est*, by broad day, and make their attorney, and

Vide statut. de
conspiratoribus,
anno 21 E. 1.
vet. Mag. Cart.
part 1. fo. 111.
& definition
conspir.
33 E. 1. ibid.
fo. 90. b.
Artic. sup. Cart.
cap. 10. F. N. B.
114, 115.
Stanf. pl. cor.
172, &c.
Lib. 4. fo. 45.
Lib. 9. fo. 16,
56, 57. 78.
^b 24 E. 3. 45.
27. ass.
43 E. 3. Con-
spiracy, 11. 59.
4 H. 5. Judg-
Sect.

ment 120. the like judgement as in attain. See the first part of the Institutes.

^c Trin. 18 E. 3. Coram rege, Rot. 148. Pasch. 32 E. 3. Coram rege. Rot. 58.

forthwith return by broad day: and their houses, lands, and goods, shall be seised into the kings hands, and their houses and lands estrepped and wasted, their trees rooted up and errased, and their bodies to prison: all things retrograde, and against order and nature, in destroying all things that have pleased or nourished them; for that by falsehood, malice, and perjury, they sought to attain and overthrow the innocent. Which judgement in our books is called, a villanous judgement. First, in respect of the villainy and shame, which the party hath which receiveth it. Secondly, for that by the judgement he loseth the freedom and franchise of the law, and therefore undergoeth a kinde of bondage and villany. And the reason of this heavy and terrible judgement is: 1. For that the offenders have conspired and plotted the death and shedding of the blood of an innocent. 2. That they do it under faire pretence of justice and by course of law, which was instituted for the protection and defence of the innocent. 3. That if they had attained the innocent, he should have lost his life, (by an infamous death) his lands, his goods, and his posterity: for his blood thereby should have been corrupted, &c. 4. All this falsehood, malice, and perjury is committed in *placito coronæ*, in a suit for the king, which aggravateth and increaseth the offence; for that the king is the head of justice, and a protector of the innocent: and therefore at the kings suit, and not at the suit of the party, this villanous judgement shall be given. So as the law hath excellently distributed the remedies; the private action of the party to give him damages, &c. and the suit of the king for exemplary punishment. And it is to be observed, that this villanous judgement is given by the common law, (as in the case of attain) and not by force of any statute.

27 Lib. ass. p. 12.

King E. 3. demanded of his justices and serjeants, whether divers men being indicted of conspiracy for the indicting of R. of felony, were mainpernable or no? and they answered the king expressly, that they were not, in respect of the odiousnesse of the offence.

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C A P. LXVII.

Of Pensions, &c. received by Subjects, of Foraine Kings, &c.

See the fourth part of the Institutes, cap. the Chancery Artic. against Cardinall Woolsey, art. 27. Vide p. rl. 7. R. 2. nu. 16. Mat. ca. 26. v. 24. *Nemo potest duobus dominis servire: aut enim unum odio habe-*

IT is not lawfull for any subject of the king of England to take a pension, &c. of any foraine king, prince, or state (without the kings license) albeit they be in league with the king of England; both, for that they may become enemies, and for that also it is mischievous and dangerous to the king himself and his state, as it appeareth by this distichon,

*Principe ab externo veniunt lethalia dona,
Quæ studii specie, fata, necemque ferunt.*

And this was (say they) the case of the lord Hastings chamberlaine to king E. 4. who in the fifteenth year of his raig, received a pension

a pension of two thousand crowns yearly from the French king: who being informed by just. Catesbye his inward friend, and others learned in the law, that the receiving hereof was an offence against law, being desired by Pierce Clerett a Frenchman (who paid the pension) to make him an acquittance for receipt thereof for his discharge, utterly refused the same. This report I do the rather hold to be true, for that all our English historians, (who for the most part rehearse but the carkasse or outside of any point in law) give great credit hereunto. And what ill consequence this and other like pensions, and others of the councill of king E. 4. had, you may reade in our histories.

See the case in 7 R. 2. of ^a Spencer bishop of Norwich; and there also the case of ^b Pierce Cressingham, and others: and of ^c sir William Ellingham and others, punished for receiving of money, &c. of the French king, which drew them without the kings license, to yeeld up castles and forts in France committed to their custody, punished by fine and imprisonment.

See the fourth part of the Institutes, cap. of the Chancery, artic. 27. against Cardinall Woolsey.

bit, et alterum diligit, aut unum sustinebit, et alterum contemnet.

4 Regum, ca. 5. v. 26, &c. Gehefi. See 3 Jac. ca. 5. concerning the service of a subject as a souldier or captain to a forain prince, hereafter cap. Fugitives.

Polydor. Hall. Hollingshed.

Stowe, &c.

^a Rot. Parl.

7 R. 2. nu. 15.

18. 20. 21, 22,

23.

^b Ibid. nu. 17.

^c Ibid. nu. 24.

C A P. LXVIII.

[145]

Of Bribery, Extortion, Exaction, &c.

And first of Bribery.

BRIBERY is a great misprision (1), when any man in judicial place (2) takes any fee or pension, robe, or livery, gift, reward (3) or brocage (4) of any person, that hath to do before him any way (5), for doing his office, or by colour of his office, but of the king only, unlesse it be of meat and drink, and that of small value, upon divers, and grievous punishments.

Fortescue, ca. 51.

This word [bribery] commeth of the French word *briber*, which signifieth to devoure, or eat greedily, applyed to the devouring of a corrupt judge, of whom the Psalmist speaking in the person of God, saith, *Qui devorat plebem meam sicut escam panis. Qui cognoscit faciem in judicio, non bene facit: iste pro buccella panis deserit veritatem.*

Psalm 13. 4.
Prov. 28. 21.

But let us peruse the branches of this description.

(1) *A great misprision.*] But it may be objected, that bribery in a judge was sometime adjudged a higher offence. For whereas at the assizes holden at Lincolne in the 23 yeare of E. 3. an exigent was to have been awarded against Richard Saltley, Hildebrand Boreward, Guilbert Holliland, Thomas Derby, and Robert Dalderby, who formerly had been indicted of divers felonies before sir William Thorpe, chiefe justice of the kings bench, and one of the justices of assize of the said county of Lincolne, he the said sir

Rot. Pat. anno 24 E. 3. part 3. m. 2. and Rot. Pat. anno 25 E. 3. part 1. m. 17. Rot. Parl. 25 E. 3. nu. 10. 23 E. 3.

William

Anno 24 E. 3.

The oath of the
justices anno
18 E. 3.

20 E. 3. cap. 1.

Anno 35 E. 1.
the stat. of Car-
lisle.

20 E. 3. cap. 4.

2 R. 3. fo. 11.

See 8 R. 2.

cap. 3. Rot.

Parl. 10 R. 2.

nu. 24.

William Thorpe, to stay the said writ of exigent against them, *cepit munera contra juramentum suum*, viz. of Richard Saltly, 10 li. of Hildebrand, 20 li. of Holliland, 40 li. of Derby, 10 li. and of Daldarby, 10 li. King Edward the third appointed the earles of Arundell, Warwick, and Huntingdon, and two lords, the lord Grey and the lord Burghers' to examine this matter. Before whom sir William Thorpe being charged with the said bribery, *Non potuit dedicere, &c.* Now the record saith, *Consideratum est per dictos justiciarios assignatos ad judicand. secundum voluntatem domini regis, et secundum regale posse suum, quod quia predictus Willielmus de Thorpe, qui sacramentum domini regis, quod erga populum suum habuit custodiendum, fregit maliciose, false, et rebelliter in quantum in ipso fuit, et ex causis supradictis per ipsum Willielmum, ut predictum est, expresse cognitis, suspendatur, et quod omnia træ. et tenta., bona et catalla sua remaneant forisfacta.* This sentence seemeth to have his foundation as well upon the oath of the judges, (for the record saith) *contra juramentum suum*, and the conclusion of the oath, and in case ye be found in any default in any of the points aforesaid, ye shall be *ad voluntatem regis*, of body, lands, and goods, thereof to be done as pleaseth him: as also for that this last clause is enacted by authority of parliament (as they say) in anno 20 E. 3. And hereupon they the said lords were appointed to judge *secundum voluntatem domini regis, et regale posse suum*, according to the words of the oath and act of parliament. And this judgement was repeated in anno 25. to the lords, and affirmed by them.

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This president is not to be followed at this day for divers causes. First, it seemeth by the violation of the kings oath, and of this word [*rebelliter*] and by the forfeiture of all his lands and tenements to the king, that this offence should be treason against the king, and then it being either high treason, or petit treason, it is taken away by the statute of 25 E. 3. *De proditionibus*, the same being none of them, that are there expressed. And in all the records this word [*felonice*] is not to be found, as it ought to have been, if it had been felony.

Neither by the words of the oath, or of the supposed act of 20 E. 3. can the judgement (*quod suspendatur*) be warranted: for these words [to be at the kings will for body, &c.] cannot be extended to losse of life, no more then the statute of Carlisle (*sub forisfactura omnium, quæ in potestate sua obtinet*) extendeth not to forfeiture of life, but to imprisonment, &c. viz losse of liberty, &c.

But at this parliament, viz. in anno 20 E. 3. taking in hand of quarrels, other then their own, and maintenance of them is prohibited upon the paines aforesaid, viz. the paines contained in the said supposed act of 20 E. 3. cap. 1. upon paine to be at our will, body, lands, and goods, to do thereof as shall please us: which without question was never extended to losse of life, &c. but to imprisonment, as common experience daily teacheth. For *hæc est voluntas regis, viz. per justiciarios suos et per legem, &c.* Therefore as by the record appeareth, sir William Thorpe was pardoned and restored to all his lands. And we were desirous to see the record of the act of 20 E. 3. cap. 1. but there is no record of any such act in the parliament roll. And the very frame and composition of it seemeth to be but a rehearfall of a commandment from the king: for the letter of it beginneth. First, we have commanded all our justices,

justices, that they shall from thenceforth do equall law, &c. and therefore justly omitted out of the parliament roll of acts of parliaments: and yet the imprinting of it necessary, for that the fourth chapter of this parliament hath reference to the paynes contained in it.

It is enacted by Parliament anno 11 H. 4. in these words.

Vid. 1 H. 4. nu. 99. & Nota.

Item, *Que nul chancelor, treasurer, garden del privie seal counselor le roy, sernts. a counsell del roy, ne nul auter officer, judge ne minister le roy, pernans fees ou gages de roy pur lour ditz offices ou services, preigne en nul manner en temps à vener ascun manner de done ou brocage de ulluy pur lour ditz offices et services a faire, sur peine de responder au roy de la treble que issint preignent, et de satisfaire la partie, et punys al volunt le roy, et soit discharges de son office, service, et counsell pur tous jours, et que chescun que voiera pursuer en la dit matter, eyt la suite cibien pur le roy, come pur luy mesme, et eit la tierce part del somme, de que la partie est duement conviēt.*

Rot. Parl. anno 11 H. 4. nu. 28. never imprinted.

By this act of parliament, which is the judgement of the whole parliament, it appeareth, that, if that which is imprinted as the first chapter of 20 E. 3. had been an act of parliament, then this statute of 11 H. 4. would never have inflicted this kinde of punishment, which is other, and farre lesse, then that which is mentioned in 20 E. 3. and where it is said in this act of 11 H. 4. (*et punis al volunt le roy*) that is, by fine and imprisonment by the court where the conviction shall be; for, as hath been said, *hæc est voluntas regis, viz. per justiciarios suos, et legem suam, et non per dominum regem in camera sua, vel aliter.*

2 R. 3. 11. a.

So as by warrant of this act of parliament we have said, that bribery is a misprision; for that it is neither treason, nor felony; and it is a great misprision, for that it is ever accompanied with perjury.

* True it is, that sir Thomas Weyland, chief justice of the court of common pleas, was attainted of felony, but it was not for bribery, but being guilty of † being accessory to murder, for the which by the common law he was abjured the realm.

* Plac. de parl. apud Asherugg in Cro. Ep. anno 19 E. 1. Et Hollingsh. Chron. pag. 284, 285. he confessed felony, and abjured.

Likewise Adam de Stratton chief baron of the Exchequer a man of great possessions and riches was attainted of felony by him committed, all which I collect upon records of parliament the surest guides. For in the parliament holden in 18 E. 1. in the same year when he was attainted, I find two petitions, one preferred by himself in these words, *Adam de Stratton petit gratiam regis, quòd restitatur ad aliquam partem terrarum suarum, et de bonis suis quæ habuit tempore quo fuit.** viz. 26000 li.

[147] Rot. Parl. 18 E. 1. fo. 5. nu. 61. * There is a space left in the record.

The other by Margaret de Boteler in these words, *Margareta quæ fuit uxor Joh. de Boteler, de qua Adam de Stratton tenuit 12 li. 10. s. in London, clamat habere ut eschaet. Responss. Rex non concessit; quia in civitate nulla est eschaeta nisi regis.* And at the same parliament, fo. 3. it is resolved, *non sunt nisi tres formæ brevis de eschaeta;*

Et ibid. nu. 69.

eschaeta; quia utlagatus, vel suspensus, vel abjuravit regnum. And by consequence Adam de Stratton seeing his lands escheated, must have the judgement of one of these three. Which we have added to answer secret objections that might be made out of the mistakings of our Chronicles.

Rot. Parl. 20
E. 1. fol. 5.

The rest of the justices were removed, fined, and imprisoned, saving Johannes de Mettingham, and Elias de Beckingham, who to their eternall memory and honour were found upright, and free from all bribery and corruption.

10 R. 2. nu. 24.

It was petitioned in parliament, that the statutes whereby the justices of the one bench or the other should take no reward, ne be of any mans fee, may be observed. The kings answer was, [the king hath and will charge such justices to minister right, and will punish the contrary, and therefore willeth that all statutes made touching them and the barons of the exchequer, be made void.

(2) *When any man in judiciall place, &c.* For the difference between bribery and extortion is, that bribery is only committed by him, that hath a judiciall place, and extortion may be committed both by him that hath a judiciall place, or by him that hath a ministeriall office.

Deut. 16. 19.

And this offence of bribery may be committed by any that hath any judiciall place either ecclesiasticall or temporall. *Non accipies personam nec munera,* (and the reason is expressed by the Holy Ghost) *quia munera excæcant oculos sapientum, et mutant verba justorum.*

If bribery hath so great force, as to blinde the eyes of the wise judge, and to change the words of the just, *Beatus ille, qui excutit manus suas ab omni munere. Judex debet habere duos sales; salem sapientiæ, ne sit insipidus, et salem conscientiæ, ne sit diabolus.*

Pasch. 17 E. 3.
Coram rege.
Rot. 139. Essex.
John Berners
case.
Rot. Parl. 7 R.
2. nu. 12, 13.

Though the bribe be small, yet the fault is great: and this appeareth by a record in the reign of E. 3. *Quia diversi justiciarii ad audiendum et terminandum assignat' ceperunt de Johanne Berners qui indicatus fuit, 4. li. pro favore habendo die deliberationis suæ, finem fecerunt domino regi per iiii M. marcas,* so as they paid for every pound a thousand marks. See before sir William Thorps case. Rot. Parl. 7 R. 2. the chancellour was accused of a bribe of ten pound, and his man four pound and certain fish, which, though the things were small, yet it had been punished, if it had been proved.

Anno 18 E. 3.

(3) *Take any fee, robe, gift, or reward.*] This is warranted by the oath abovesaid.

* Since these Institutes so was it resolved in the Star-chamber, Trin. 6 Car. Reg. in an information against Bonham Norton and others.

But admit the party * offereth a bribe to the judge, meaning to corrupt him in the cause depending before him, and the judge taketh it not, yet this is an offence punishable by law in the party that doth offer it.

(4) *Brocage.*] There is good warrant for this word by the said act of 11 H. 4.

(5) *Of any person that hath to doe before him any way.*] This hath his ground upon the oath aforesaid, so as bribery may be committed not only when a suit dependeth *in foro contentioso* (as it was in the case of sir Fr. Bacon lo. of S. Alban lo. chancellour of England, who for many exorbitant and sordid briberies was sentenced by the lords of parliament, which you may reade Rot. Parl. anno 19 *Jacobis regis*) but also when any in judiciall place doth any thing *virtute* or *colore officii*, though there be no suit at all. For example, if the

the lord treasurer for any gift or brocage, shall make any customer, controller, or any officer or minister of the king, this is bribery, for he ought to take nothing in that case by the statute of 12 R. 2. but that he make all such officers and ministers of the best, and most lawfull men, and sufficient for their estimation and knowledge. (An excellent law tending greatly to his majesties advantage, to the good usage and encouragement of merchants, &c. and generally to the advancement of commerce, trade, and traffique, the life of this island.) Reade this statute, for it is of a large extent, and the statute of 5 E. 6. for they are laws made *contra ambitum*, and worthy to be put in execution, for they prevent bribery and extortion; for they that buy will sell.

2 R. 2. ca. 2.
See the statute of
5 E. 6. ca. 16.

Vendit Alexander claves, altaria sacra :

Vendere jure potest, emerat ille prius.

And that the statute of 5 E. 6. doth extend as well to ecclesiastical offices, as temporall, which concern the administration and execution of justice. And it was resolved in the case of doctor Trever chancellour of a bishop in Wales, that both the office of chancellour and register of the bishop are within that statute, because they concern the administration of justice.

Hil. 8 Ja. in
communi banco
D. Trevers case.
See hereafter ca.
of Simony, and
the 1. part. of
the Instit. sect.
378. fo. 234.
* Rot. Parl. 21
Ja. regis.

* L. Earl of M. lord treasurer of England took *colore officii* divers bribes, &c. And namely where the farmers of the customes exhibited a petition to have certain just allowances, which his majesty referred to the said lord treasurer, who long delayed the petitioners, untill they gave him severall bribes, and then he gave way to relieve them. For this, and other his briberies, extortions, oppressions, and other grievous misdemeanours in his severall offices of the lord treasurer, and master of the court of wards (no suit being in any of those cases depending) upon complaint, and charge of the commons in this parliament, and after evident proof and often hearing of the cause, the lords of parliament (the lord treasurer being brought to the bar by the gentleman usher and serjeant at arms, and kneeling till he was commanded to stand up) upon the petition of the commons by the speaker gave this judgment against him by the mouth of the lord keeper in these words. This high court of parliament doth adjudge. First, that you L. Earl of M. now lord Treasurer of England shall lose all your offices which you hold in this kingdome. 2. And shall be for ever incapable of any office, place, or imployment in this state and common-wealth. 3. And that you shall be imprisoned in the tower of London during the kings pleasure. 4. And that you shall pay to our soveraign the king the fine of 50000. li. 5. And that you shall never sit in parliament any more. 6. And that you shall never come within the verge of the kings court, as by the said roll of the parliament appeareth, which is worthy of your reading at large.

In anno 21 H. 8. by articles under the hands of all the lords of the privy councell, (whereof sir Thomas Moor then lord chancellour was one) and of the principall judges of the realm, which I have seene, cardinall Woolsey was charged with divers briberies, namely in the eighteenth article, in these words. Also the said lord cardinall constrained all ordinaries in England, yearly to compound with him, or else he would usurp half, or the whole of their jurisdiction by prevention, not for good order of the dioceses, but to extort treasure: for there is never a poor archdeacon in

Anno 21 H. 8.
Artic. 18.

21 H. 8. ca. 5.
Vide 2 R. 2.
Rot. Parl.
nu. 46.

[149]
The law before
the conquest.
Inter leges Ca-
nuti, cap. 13.

in England but that he paid to him a yeerly portion of his living.

If any ordinary, &c. having power by the act of 21 H. 8. to grant the administration of the goods of him that dieth intestate, or as intestate, to the widow or next of kin, &c. take any reward for preferring of any person, before another, to the administration, it is bribery.

Si quis contra fas et leges administravit, vel pro odio, quod in alium habuerit, judicavit perperam, aut denique minumarium se judicem præbuerit, proprii capitis æstimatione Anglorum jure regi damnatur, nisi quidem legum id accidisse inscitia, &c.

C A P. LXIX.

Of Extortion, Exaction, &c.

THIS is another great^a misprision because it is accompanied with perjury. Hereof you may read in the first part of the Institutes, sect. 701. See also in the second part of the Institutes, W. 1. cap. 26. and cap. 10. And in the fourth part of the Institutes, cap. Chancery, in the articles against cardinall Woolsey, article 3. Extortion of Ordinaries. ^b *Ranustatores hominum, extortio- natores hominum*: a rancunier, an extortioner of men.

^c The collectors of the fifteens were committed to prison, for that they took of every town eighteen pence for an acquittance.

^d A coroner was committed to prison, because he would not take the view of the dead body, before he had received for himself six shillings eight pence, and for his clerk two shillings, and was fined at forty shillings.

^e If any of the kings counsell or his ministers doe exact a bond of any of his subjects, to come to the king with force and arms, &c. when they should be sent for, such writings are to the kings dishonour; for that every man is bound to do to the king as to his liege lord, ^f al that appertaineth to him, without any manner of writing, (note the generality hereof) and such writings are to be cancelled, as by the act appeareth.

Hereupon (by authority of this parliament) these conclusions doe follow. First, whatsoever any subject is bound to doe to the king, as to his liege lord, no bond or writing is to be exacted of the subject for doing thereof. Secondly, whatsoever bonds or writings are to the kings dishonour, are against law. Thirdly, whether such bonds or writings be made to the king or any other, the bonds or writings be void.

^g If a bishop or other ecclesiasticall judge, or minister, doth exact a bond or oath of any person in any case ecclesiasticall, not warrantable by law, the bond is void, and this exaction is punishable by fine, &c. the record is very long, but worthy to be read. See Rot. Parl. anno 8 H. 4. nu. 15, 16, 17, 18, 19, 20. excellent matter

^a Lib. 10. fo.
101. & 102.
Beawfages case.
See the 1. part
of the Institutes
sect. 701. verb.
[Extortioners]
2. part of the In-
stit. W. 1. ca.
26. The 4. part
of the Institutes.
ca. Chancery in
the articles
against Cardinall
Woolsey, art. 3.
^b Trin. 28 E. 3.
Coram rege.
Rot. 37 Eborum.
^c Hil. 20 E. 3.
Coram rege.
Rot. 159. Norff.
^d Ibidem in the
same roll.
^e 1 E. 3. stat. 2.
ca. 15.
^f Nota.

^g Int. Inquisit.
apud Lancelton
Coram Rogero
Loveday, and
Waltero de
Wynborn, an.
6 E. 1. Cornub.

matter concerning fees in courts of justice, and in the kings household.

^h *Officialis indictatus de citando, et affligendo plurimos, non potest deducere, et petit quod admittatur ad finem.*

ⁱ *Contra sequestratores, commissarios, et alios offic' episcoporum pro captione feodorum, priusquam debent pro testamentis probandis.*

^k The extortion of the clergy, and of their ministers to be enquired of by justices of peace.

Resolutions upon the statute of 21 H. 8. ca. 5.

¹ If a man makes his testament in paper, and dieth possessed of goods and chattels above the value of forty pound, and the executor causeth the testament to be transcribed in parchment, and bringeth both to the ordinary, &c. to be proved: it is at the election of the ordinary whether he will put the seal and probate to the originall in paper, or to the transcript in parchment: but whether he put them to the one or the other, there can be taken of the executor, &c. in the whole but five shillings, and not above, viz. two shillings six pence to the ordinary, &c. and his ministers, and two shillings six pence to the scribe for * registering the same: or else the said scribe to be at his liberty, to refuse those two shillings and six pence, and to have for writing every ten lines of the same testament, whereof every line to contain ten inches, one penny.

If the executor desire that the testament in paper may be transcribed in parchment, he must agree with the party for the transcribing; but the ordinary, &c. can take nothing for it, nor for the examination of the transcript with the originall, but only two shillings six pence for the whole duty belonging to him. Where the goods of the dead doe not exceed an hundred shillings, the ordinary, &c. shall take nothing, and the scribe to have only for writing of the probate six pence, so the said testament be exhibited in writing with wax thereunto affixed ready to be sealed. Where the goods of the dead doe amount to above the value of an hundred shillings, and doe not exceed the summe of forty pound, there shall be taken for the whole but three shillings six pence, whereof to the ordinary, &c. two shillings six pence, and twelve pence to the scribe for registering the same. Where by custome lesse hath been taken in any of the cases aforesaid, there lesse is to be taken. And where any person requires a copy, or copies of the testament so proved, or inventory so made, the ordinary, &c. shall take for the search, and making of the copy of the testament or inventory, if the goods exceed not an hundred shillings, six pence, and if the goods exceed an hundred shillings, and exceed not forty pound, twelve pence. And if the goods exceed forty pound, two shillings six pence, or to take for every ten lines thereof of the proportion before rehearsed, a penny.

When the party dies intestate, the ordinary may dispose somewhat in pious uses, notwithstanding the said act of 31 E. 3. but with these cautions, 1. That it be after the administration granted, and inventory made, so as the state of the intestate may be known, and thereby the sum may appear to be competent. 2. The administrator must be called to it. 3. The use must be publique and godly. 4. It must be expressed in particular. And, 5. There must be a decree made of it, and entred of record: so in case of commutation

^h Mich. 22 E. 3. Coram rege Rot. 181. Eborum.

ⁱ Hil. 23 E. 3. Coram rege.

^k Rot. Parl.

3 R. 2. nu. 38, 39. 1 H. 5. nu. 23, 24.

¹ Mich. 6. Jacobi Rot. 1301 in communi banco. int. Edm. Neale informer, &c. et Jacobū Rowse official' infra Archidiaconat' de Huntingdon defendant per le chief justice Walmesly, Warburton, Daniell, and Foster.

* [150] For punishment of ecclesiasticall judges for extortion. See Rot. de Inquisit. in Com. Eborum, Somerset, &c. anno 4 E. 1. in Thesauro. De iudicibus ecclesiasticis dicunt, &c. Rot. Parl. 8 E. 3. nu. 9. The statute of 31 E. 3. cap. 4. Pasch. 32 E. 3. Coram rege. Rot. 27. Rot. Parl. 50 E. 3. nu. 9.

1 R. 2. nu. 109.

2 R. 2. nu. 40.

13 R. 2. nu. 38,

39. 7 R. 2. nu.

53. The statute of 3 H. 5. ca. 4.

Mich. 20 Jacobi in Camera Stellata, in Sir Jo. Benaets case.

commutation of penance, it must be after sentence, and *mutatis mutandis, ut supra.*

2 H. 4. ca. 10.

Whereas twenty, forty, or an hundred be indicted of one felony, or one trespassse, and all plead to an issue, as not guilty, the clerk of the crown of the kings bench, ought not to take for the *venire facias*, or for the entring of the plea, above two shillings, but the said clerk did take for every such name by extortion two shillings. It is ordained and established, that the said clerk of the crown, shall take no more then hath been duly used of old time. And moreover our soveraign lord the king hath charged the said justices of the kings bench, that no extortion be done in this behalf in the bench aforesaid.

2 H. 4. ca. 8.

The chirographer of the king in the common bench for making and writing of every fine levied four shillings, and no more, upon pain (if he take more) to lose his office, be expelled the court, one years imprisonment, and to pay to the party grieved his treble damages.

2 H. 4. ca. 23.

The fees to the marshall of the marshalsea of the kings house, you may read in the statute of 2 H. 4. Vide 9 R. 2. cap. 5.

33 H. 8. ca. 39.

If any auditor of the exchequer, dutchy of Lanc', or court of wards take more then three shillings four pence, for the enrolment of any letters patents, decree, grant, or indenture of lease, he shall forfeit, for every penny so taken, six shillings eight pence.

Munera ne capias, uncus latet hamus in esca.

Nulla carent visco munera, virus habent.

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C A P. LXX.

OF USURY.

37 H. 8. ca. 9.
13 Eliz. ca. 8.

USURY is a contract upon the lone of money, or giving dayes for forbearing of money, debt, or duty, by way of lone, chivifance, shifts, sales of wares, or other doings whatsoever. *Usura dicitur ab usu et ære, quia datur pro usu æris: or usura dicitur, quasi ignis urens.*

Deut. cap. 21.
Exo. 22. Levit.
25. Ezech. 2.
Psal. 15.

And first, usury is directly against the law of God. And the reason wherefore it was permitted by the law of God for an Hebrew to an infidell, was; because it was a mean either to exterminate, or to depauperate them, as they should not be able to invade, or injure Gods people.

c 13 Eliz. cap. 8.
21 Jac. cap. 17.

c And it is adjudged by authority of parliament, that all usury being forbidden by the law of God, is sinne, and detestable. And it is also enacted by parliament, that all usury is unlawfull, that is to say, against the lawes of the realme. Let us therefore see what former laws have provided herein.

d See the Cust. de
Norm. cap. 20.
Int. leges S.
Edw.
e Glanvil. lib. 7.
cap. 16.

d *Siquis de usura convictus fuerit, omnes res suas amittat.*

e *Usurarii omnes res, sive testatus, sive intestatus decesserit, domini regis sunt: vivus autem non solet aliquis de crimine usuræ appellari, nec convinci, sed inter cæteras regias inquisitiones solet inquiri, et probari aliquē in tali crimine decessisse per 12 legales homines de viceneto et per eorum*

eorum sacramentum. Quo probato in curia, omnes res mobiles, et omnia catalla, quæ fuerunt ipsius usurarii mortui, ad usum domini regis capiuntur, penes quemcunque inveniuntur res illæ. Hæres quoque ipsius, hac eadem de causa exheredatur secundum jus regni; et ad dominum, vel dominos revertetur hæreditas. Sciendum tamen, quod si quis aliquo tempore usurarius fuerit in vita sua, et super hoc in patria publice defamatus, si tamen à delicto ipso ante mortem suam destiterit, et penitentiam egerit; post mortem ipsius, illæ, vel res ejus lege usurarii minime censentur. Oportet ergo constare quod usurarius decesserit aliquis ad hoc, ut de eo tanquam de usurario post mortem ipsius judicetur, et de rebus ipsius, tanquam de rebus usurarii disponatur.

Vide lēstatute de Merton, cap. 5. et Fleta, lib. 2. ca. 50. ^f Manifestus usurarius est intestabilis.

^g Et inter les constitutions ordeins p. les viels royes Alfred, &c. ordeine fuit que les chattels des usurers fuissent al roy, et que les heritages des usurers remeissent escheats al seigniors des fees, et ne sert' interre in sanctuary.

^h Item, atrox injuria est, quæ omnium mobilium amissionem confert et legem liberam aufert, quæ locum habet in usurariis Christianis.

ⁱ Ad 16 Artic. de usuris respondetur: quod licet episcopis pro peccato illo penitentiam usurario injungere salutarem. Sed quia committendo usuram, usurarius furtum committit, et super hoc est convictus, catalla et tre' usurarii, sicut catalla furis, sunt regis, et si qui sequi voluerint contra hujusmodi usurarium, restituantur eis bona sua, quæ ipsi usurarii per usuram extorserunt.

^k And it appeareth by Bracton, that it was an article of the charge of inquiry by justices in eire de usurariis Christianis mortuis, qui fuerunt, et quæ catalla habuerunt, et quis ea habuerit. Et quod nullus recipiet usuram arte vel ingenio. And divers were indicted for taking of usury before justices in eire, and some were pardoned by the king, and others not.

In ancient time a great revenue by reason of the usury of the Jewes came to the crown: for between the 50 year of H. 3. and the 2 yeare of E. 1. which was not above seven yeares compleat, there was paid into the kings coffers four hundred and twenty thousand pounds of and for the usury of the Jewes. And yet that excellent king for divers weighty seasons worthy to be written in letters of gold, did by authority of parliament utterly prohibit the same, in these words. Forasmuch as the king hath perceived that many evils and disherisons of the good men of his land had come to passe by the usuries which the Jewes have done in times past, and that many sins and offences have risen thereupon: albeit he and his auncesters have had great profit thereby of the Jewes; notwithstanding for the honour of God, and for the common profit of his people, the king hath ordained, and established, that no Jew shall take usury, &c. Before this time Jewes were divers times banished this realm, but still they returned again. But this wise and worthy king by authority of parliament banishing their usury, put the Jewes into perpetuall exile into forain countries, where usury was tolerated. By which act it appeareth that the suppression of usury tendeth to the honour of God, and the common profit of the people.

By which authorities and records, and by many others that might be remembred, it appeareth that by the ancient laws of this realm usury was unlawfull, and punishable, although the punish-

Merton cap. 5.

^f Fleta, lib. 2.

cap. 50.

^g Mirror, cap. 1.

§ 3. & cap. 5. §.

1. Parl. 50 E. 3.

nu. 58.

^h Fleta, lib. 2.

c. 1.

ⁱ Rot. Parliam.

51 H. 3. Peti-

tiones cleri.

^k Bract. lib. 3.

fo. 116, 117.

Fleta, lib. 2. ca.

1. Cap. itineris.

vet. Mag. Cart.

par. 1. fo. 151.

Rot. pat. 3 E. 1.

m. 10. 19, 20,

21, 22. 36 Rot.

claus. 2 E. 1.

m. 1.

^l Rot. pat. 3 E.

1. nu. 14. 17. 26.

Willielm. Mid-

dleton reddit

comptum.

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Vet. Mag. Cart.

2. part, fo. 58.

59. Stat. de Ju-

daismo. See the

2. part of the In-

stitutes, stat. de

Judaismo and

the Exposition

upon the same.

15 E. 3. ca. 5.

ment was not always one, but sometime greater, and sometime lesser: and therefore at the parliament holden in the fifteenth year of E. 3. It was enacted, and declared, according as it had been sometime holden, that the king and his heirs should have conusance of usurers after their death, and that the ordinary of holy church should have conusance of usurers alive, for as much as to them it appertains, to compell them by the censures of holy church, for the sin, to make restitution of usuries taken against the law of holy church. But this statute was afterward repealed, as hereafter shall appear.

Hil. 6 E. 3.
Coram rege rot.
130. North.
Vide 26 E. 3.
fo. 71. Moignes
case.

Johannes Hopd convictus per juratores pro usura capiend' 11 s. 8 d. pro 20 s. præstand', et sic de similibus.

Rot. Parl. 50 E.
3. nu. 158.
Vide Rot. Parl.
6 R. 2. nu. 57.
14 R. 2. nu. 24.

Many of the citizens of London giving over trade and traffick (which is the life of the common-wealth, and specially of an iland) and betaking themselves to live upon usury, Sir William Walworth being lord maior, by the advice of the aldermen his brethren, took such good and strict order for the execution of laws, and for suppression of usury within the city of London, as the commons in parliament put up a petition to the king in these words, [That the order that was made in London against the horrible vice of usury, might be observed throughout the whole realm] whereunto the king answered; that the old law should continue.

Rot. Parl. 14
R. 2. nu. 14.

After this Sir John Northampton, maior of the city of London, by the advice of the aldermen his brethren, took more strict order for the suppression of unlawfull usury within the city of London: which had so good successe, as the commons in parliament petitioned the king in these words. The commons pray, that against the horrible vice of usury (then tearmed schefes) and practised as well by the clergy as laity, the order made by John Northampton late maior of London, may be executed through the realm. Whereunto the king answered, The king willeth those ordinances to be viewed, and if they be found to be necessary, that the same be then affirmed. And here it is to be observed, that of ancient time the notable merchants of London detested usury, and dry exchange.

3 H. 7. ca. 9, 6.
11 H. 7. ca. 8.
Vide 5 E. 6.
c. 20.

By the statutes of 3 H. 7. and 11 H. 7. all usury is damned and prohibited, and there it is called dry exchange. So as usury is not only against the law of God, and the laws of the realm, but against the law of nature. *Usura contra naturam est, quia usura sua natura est sterilis, nec fructum habet.*

27 H. 8. ca. 9.
13 Eliz. ca. 8.
21 Jac. ca. 17.

But now by the statutes of 37 H. 8. and 13 Eliz. all former acts, statutes, and laws ordained and made, for the avoiding or punishment of usury are made void, and of none effect. So as at this day, neither the common law, nor any statute is in force, but only the statutes of 37 H. 8. 13 Eliz. and 21 Jac. And the ecclesiasticall jurisdiction is saved by the said statute of 13 Eliz. as thereby it appeareth. For the exposition of which statutes of 37 H. 8. and 13 El. see in my Reports, viz. lib. 3. fo. 80, 81. lib. 5. fo. 69, 70. lib. 9. 26.

C A P. LXXI.

Of Simony and corrupt Presentations.

SIMONY. *Simonia est vox ecclesiastica, à Simone illo Mago deducta, qui donum spiritus sancti pecuniis emi putavit.*

Against simony, &c. the statute of 31 Eliz. is made in these words.

Be it enacted that if any person or persons, bodies politique or corporate, shall or doe for any summe of mony, reward, gift, profit or benefit, directly, or indirectly, or for, or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any summe of money, reward, gift, profit or benefit whatsoever, directly, or indirectly, present, or collate (1) any person to any benefice with cure of soules, dignity, prebend, or living ecclesiasticall; or give, or bestow the same for, or in respect of any such cause or consideration: * That then every such presentment, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon shall bee utterly voyde, frustrate, and of none effect (2) in law; and that it shall, and may be lawful to and for the queenes majestie, her heires and successors, to present, collate unto, or give, or bestow every such benefice, dignity, prebend and living ecclesiasticall for that one time, or turne onely, and that all and every person and persons, bodies politique and corporate, that shall give or take any such summe of mony, reward, &c. shall forfeit and lose the double value of one yeares profit (3) of every such benefice, dignity, prebend and living ecclesiasticall. And the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend, or living, shall thereupon, and from thenceforth be adjudged a disabled person in law (4) to have, or enjoy the same benefice, dignity, prebend, or living ecclesiasticall.

vill or canon law; whereof the judges of the common law in these cases

This is the text of this part of the act, now let us proceed to the exposition hereof, being a necessary law to be put in execution.

(1) *Present or collate.*] This is not onely intended, where the person presenting or collating hath right to present, or collate; but also where any person or persons, bodies politique and corporate, doe usury, and have no title to present or collate. And so it was adjudged in case where the usurpation was to a church of the king.

N 2

Simony described by the act following.

Stat. de 31 Eliz. cap. 6.

See the 2. part of the Instit in the exposition of the said act of 31 El. *Injustum est illa vendere quæ gratis distribui debent.*

vide Matth. ca. 10. ver. 8.

* Nota, the statute doth not make the bond, promise, covenant, or other assurance void, but the presentment, &c. and so it was adjudged, Pasch. 40 Eliz. Rot. 1745, in communi banco, between Gregory plaintiff and Oldbury defendant. Nota differentiam inter malum in se against the common law, et malum prohibitum by statute law; et malum in se against the common law, and malum prohibitum by the statute take no notice.

Mic. 13. Ja. in quare impedit betweene the

Sed

king and the b.
of Norwich.
Tho. Cole and
Robert Secker,
which began
Pasch. 13 Jac.
Rot. 21. for the
vicarage of Ha-
verellin Suffolk.

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Mich. 13 Jac.
ubi supra.

Mich. 41 & 42
El. in Communi
banco between
Baker and
Rogers.

24 E. 3. fo. 35.
38 E. 3. 3.
7 Eliz. Dier 257.

5 E. 3. 29.
11 H. 4. 76.
2 H. 7. 6. 11 H.
7. 11. 13 H. 7.

Sed quando præsentatio et jus patronatus sunt temporalia, quæritur quomodo fit simonia per donum pecuniæ pro illis: respondendum est quod jus patronatus et presentatio dicuntur spiritualia, respectu rei, ad quam præsentatur, quæ spiritualis est. Vide Linwood cap. de Jurejurando, fo. 80.

(2) *Shall be utterly void and of none effect.*] But here is to be observed a diversity between a presentation, or collation made by a rightfull patron, and an usurper. For in case of a rightfull patron, which doth corruptly present, or collate, by the expresse letter of this act the king shall present: but where one doth usurp, and corruptly present or collate, there the king shall not present, but the rightfull patron: for the branch that gives the king power to present, is onely intended, where the rightfull patron is in fault, but where the rightfull patron is in no fault, there the corrupt act, and wrong of the usurper maketh the benefice, &c. void, but taketh not away the lawfull title to present from the rightfull patron, and so it was adjudged in the case abovesaid.

Also upon these words, [If any patron without the notice of the person so presented, or collated, doth take reward, &c.] yet by the expresse letter of this branch the church, &c. is void, for both the letter and intention of this act is to make the admission, institution, and induction of any presentee, that commeth in by a corrupt patron void. And so was it resolved in the case abovesaid, as it hath been formerly adjudged in the common place. But where the presentee is not privy, nor consenting to any such corrupt contract, as is prohibited by this act, because it is no simony in him, there the presentee shall not be adjudged a disabled person within this act: for the words of that branch be, And the person so corruptly giving, &c. so as he shall not be disabled, unlesse he be privy to the corrupt contract: and upon the severall penning of these severall branches, the diversity abovesaid was resolved Mich. 13 Jac. *ubi supra*.

(3) *Shall forfeit and lose the double value of one yeares profit.*] This double value shall be accounted according to the very, or true value, as the same may be letten, and shall be tryed by a jury, and not according to the extent, or taxation of the church: whereof one was made both of the spiritualties and temporalities in 20 E. 1. 1292. in the time of pope Nicholas: of that *vide* 11 H. 4. fo. 35. F. N. B. 176. and Polichron, lib. 7. cap. 38. Rot. Parl. 18 E. 3. nu. 44. sta. 2. 1 R. 2. nu. 102. 8 H. 6. nu. 15. And the other taxation was made in 26 H. 8.

(4) *Be adjudged a disabled person in law.*] It was resolved in the case of Mich. 13 Jac. *ubi supra*, that the king could not dispense with this disability by a *non obstante*: for when an act of parliament is made that disableth any person, or maketh any thing void, or tortious for the good of the church, or common-wealth, in this law all the kings subjects have an interest, and therefore the king cannot dispence therewith no more then with the common law: but where a statute prohibiteth any thing upon a penalty, and giveth the penalty to the king, or to the king and informer, there the king may dispense with the penalty, and this diversity is warranted by our books.

8. b. 27 H. 8. F. N. B. 211. b. Placita com. 502.

King

* King James referred this case unto Sir Thomas Egerton lord chancellor of England, and to the chiefe justice of the kings bench. Sir Robert Vernon being coferer of the kings house, by reason of which office, he hath the receipt and payment of 40,000 li. of the kings treasure yearely, and payeth the wages beneath the stayres, &c. did bargaine and sell the said office for a great summe of money, and for certaine annuities to be paid, to Sir Arthur Ingram knight. The first question was whether the said office were void by force of the statute of 5 E. 6. ca. 16. The second was, seeing the words of this act be [shall be adjudged a disabled person in law, to all intents and purposes to have and occupy any such office, &c.] whether the king might dispense with that [disabled] and upon mature deliberation and hearing of counsell learned, they resolved, and so certified the king, that the said office was void by the said bargaine and sale, and that the king could not dispense with the said disability, for the reason and cause above said; and thereupon Sir Marmaduke Darrell was preferred to that office.

* Anno 12 Jac.
regis Sir Arthur
Ingrams case
upon the statute
of 5 E. 6.
cap. 16.

Likewise by the statute of 5 Eliz. every person which shall be elected a knight, citizen, burges, or baron of the cinque ports for any parliament, before he shall enter into the parliament house, shall take the oath of supremacy appointed by the act of 1 Eliz. and that he that entreth into the parliament without taking the said oath, shall be deemed no knight, citizen, burges, or baron, nor shall have any voice, but shall be, as if he had been never returned, or elected. Here be words that amount to a disability, and therefore that according to the former resolutions the king cannot dispense with the same.

5 Eliz. cap. 1.

It is further enacted, that if any person shall for any sum of money, reward, &c. (*ut supra*) other then for usuall fees, admit, institute, install, induct, invest, or place any person in or to any benefice with cure of souls, dignity, prebend, or other living ecclesiasticall: that then every person so offending shall forfeit and lose double value, *ut supra*; and that thereupon immediately from and after the investing, installation, or induction thereof had, the same benefice, &c. shall be eftsoons meerely void, &c.

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The reason of this clause (for I was of this parliament, and observed the proceedings therein) was to avoid hasty and precipitate admissions, institutions, &c. to the prejudice of them that had right to present, by putting them to a *quare impedit*, and no such hast or precipitation is used, but for reward, &c. as it is to be presumed.

There be two great enemies to justice and right, viz. *præcipitatio*, et *morosa cunctatio*.

And albeit the church is full by the institution, &c. against all, but the king, yet the church becommeth not void by this branch of this act, untill after induction.

And that the patron, &c. shall and may present, &c.] This is intended of the rightfull patron, or of him that hath right to present.

Vid. 14 H. 4.
19.

And be it further enacted, that if any incumbent of any benefice with cure of soules shall corruptly resigne, or exchange the same, or corruptly take for or in respect of the resigning or exchanging of the same, directly or indirectly, any pension, sum of mony, or benefit whatsoever: That then as well the giver as the taker, &c. shall lose double the value of the money so given, and double the value of one years profit.

By another branch of this act it is provided,

That if any person or persons shall or doe receive, or take any money, reward, &c. *ut supra*, (ordinary and lawfull fees only excepted) for or to procure the ordaining or making of any minister, or giving any orders, or licence to preach, shall for every offence forfeit and lose the summe of forty pound, and the party so corruptly made minister, shall forfeit and lose the sum of ten pound, and if at any time within seven years after such corrupt entring into the ministry, he shall accept or take any benefice, living, or promotion ecclesiasticall, that then immediately, from and after the induction, investing, or installation thereof, or thereunto had, the same benefice, living, and promotion ecclesiasticall shall be estsoons meerly void, &c.

33 E. 1. tit. Annuity 51.
Vid. Canon 40.
1 Jacobi 1603.
the oath against simony, &c.
* 9 E. 3. 22.
10 E. 3. 1.
29 E. 3. 44.
Regist. 58.
21 H. 8. ca. 13.
veri. finem.

Take a benefice.] This word *beneficium ecclesiasticum* extendeth not only to benefices of churches parochiall; but to dignities and other ecclesiasticall promotions; as to deaneries, archdeaconries, prebends, &c. And it appeareth in our * books that deaneries, archdeaconries, prebends, &c. are benefices with cure of soules; but they are not comprehended under the name of benefices with cure of soules within the statute of 21 H. 8. by reason of a speciall proviso; which they had been, if no such proviso had been added, viz. deans, archdeacons, chancellours, treasurers, chanters, prebend, or a parson where there is a vicar indowed,

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If any person or persons, bodies politique or corporate, which have election, nomination, voice, or assent in the choice, election, presentation, or nomination of any scholar, fellow or any other person to have room, or place in any church collegiat or cathedrall, colleges, schools, hospitals, halls, or societies, shall take or receive any money, fee, or reward, &c. the place, room, office, &c. of the offender shall be void, &c.

Like cases in Pl. com. 176. upon the statute of 32 H. 8. of Cond. Dier, 20 Eliz. upon the statute of 27 H. 8. Of Uses.

Which have election, presentation, &c.] This act being a law perpetuall, these words extend not only to such person and persons, &c. as at that time had election, presentation, &c. but to all and every person and persons, that at any time hereafter should have election, presentation, &c. otherwise the law should be but temporary, which should be directly against the meaning of the makers of the act. And by the same reason this act extendeth not only to churches,

churches, colledges, schools, hospitals, hals, and societies founded at the time of the making of the act, but to all such as should be erected or founded after.

And if any fellow, officer, or scholar in any of the churches, colleges, &c. *ut supra*, contract or agree for any money, reward, &c. for the leaving, or resigning up of the same his room or place to any other, &c. shall forfeit and lose double the sum of money, &c. so received, and every person by whom or for whom any money, &c. shall be given, &c. shall be incapable of that place or room for that time or turn, &c. And it is further enacted, that at the time of every such election, presentation or nomination, as well this present act, as the orders, and statutes of the same places concerning such election, presentation or nomination shall then and there be publickly read, upon pain to forfeit and lose the sum of forty pound, &c. whereof, the one moiety to him that will sue, and the other moiety to the church, colledge, &c.

I have read ancient verses concerning simony, and other corrupt entries into churches, which are not unnecessary, in detestation of them, to remember.

*Quatuor ecclesias portis intratur in omnes,
Cæsaris et simonis, sanguinis, atque Dei.
Prima patet magnis, nummo patet altera, charis
Tertia, sed paucis quarta patere solet.*

Four doors hath every church, and all but one forebod,
(Whereof unseen some may be peradventure)
Of Cesar, simonie, of kindred, and of God:
And each church-man by one of these doth enter.
Great mens command doth open wide the first,
At next by money enter many one,
The third to weak allies, but (for the church the worst),
Gods dore doth open to a few or none,

To conclude this chapter with this, that simony is odious in the eye of the common law: for a garden in socage of a mannor, whereunto an advowson is appendant, shall not present to the church, because he can take nothing for the presentation, for the which he may account to the heir; and therefore the heir in that case shall present of what age soever. And if an heir of tenant *in capite*, hath livery *cum exitibus*, yet shall the heir not present to an advowson, because no issues or profit can be taken thereof.

* *Latro est qui aurum ex religione sectatur.*

And the common law would have the patron so far from simony, as it denied him to recover damages in a *quare impedit*, or assise of *darrein presentment*, before the statute of W. 2. cap. 5.

* Simony is the more odious, because it is ever accompanied with perjury, for the presentee, &c. is sworn to commit no simony.

7 E. 3. 39. a.
27 E. 3. 89.
29 E. 3. Present.
al eglise. Fitz.
17. 8 E. 2. Present.
10. Fitz.
N B. 33. S.
24 E. 3. 29.
* *Jerome.*
3 H. 6. tit. Damages.
17 ad-judge. See the 2. pt. of the Instit.
W. 2. ca. 5. Lib. 6. fo. 50 & 51.
Lib. 5. 58, 59.
Speccot.
a Vid. Linwood ubi supra.

C A P. LXXII.

Of Monomachia, Single Combate, Duell, Affrays, and Challenges, and of Private Revenge.

Deut. 32. 35.
Rom. 12. 19.
Ecclesiasticus
28. 1.
Gen. 34. ver. 25.
& 30. of Simeon
and Levi.

THIS single combat between any of the kings subjects, of their own heads, and for private malice, or displeasure is prohibited by the laws of this realm: for in a settled state governed by law, no man for any injury whatsoever, ought to use private revenge; for revenge belongeth to the magistrate, who is Gods lieutenant. And the law herein is grounded upon the law of God. *Vindicta est mihi, et ego retribuam, dicit Dominus.* Vengeance is mine, and I will repay it, saith the Lord. *Qui vindicari vult, inveniet vindictam à domino, et peccata illius servans servabit.* He that will revenge, shall finde vengeance from the lord, and he will surely keep his sins in remembrance.

It is also against the law of nature and of nations, for a man to be judge in his own proper cause, *judex in propria causa*, especially in *duello*, where fury, wrath, malice, and revenge are the rulers of the judgement. See more of private revenge, cap. Misprision, in [*crimen commissionis.*]

Object.

But it is objected, that this single combat may be undertaken for revenge, and preservation of the honour of the party grieved.

Respons.

1. The honour or estimation of the party may more justly and notoriously be revenged, and repaired by the magistrate in publique, then by the party in private. 2. There is nothing honourable, that is against the laws of his country, and the law of nature and nations. 3. Whatsoever is against the law of God is impious and dishonourable. 4. The eminent danger of the parties seeking private revenge. First, concerning the soules of both of them, as well of him that killeth (who is *vir sanguinis*) as of him that is slain, and dieth in his malice: and as to the world, he that slayeth is in worse case, then he that is slain. For the murderer loseth not only his lands and goods, but his life also and his honour, which he so much respected: for by his attainder his blood shall be corrupted, and if he were noble, or gentle before, he thereby becomes ignoble and base, and he that is slain by law loseth none of them: so as hereof it is truly said, *Infelix pugna, ubi majus periculum incumbit victori, quam victo.* 5. Not only the soul of man, but the body also, was originally made to the image of God, *Quicumque effuderit humanum sanguinem, fundetur sanguis illius, ad imaginem quippe Dei factus est homo.* Who so sheddeth mans blood, by man shall his blood be shed, for in the image of God made he man. *Solus Deus, qui vitam dat, vitæ est dominus; nec potest quisquam eam juste auferre nisi Deus, vel gerens auctoritatem Dei, ut judex.* And this was the reason, that amongst Christians it was not lawfull for the lord to kill his villain.

Gen. 9. 6.

In ancient time so much the law did respect honour, and order, as hear what Britton saith, *Si trespass soit fait en temps de peace a chivaliers, ou a auters gents honorables per ribaudes ou auters viles persons, si le ferue soit per felony, &c. sauns desert del chivalier, que le ribaude perdra son poigne dount il trespassa.*

And many ordinances, laws, and acts of parliament, which doe prohibit the pardon of wilfull murder, are also grounded upon the law of God, to the end none should offend in hope of pardon.

* *Non accipies precium ab eo qui reus est sanguinis, statim enim et ipse morietur. Ne polluat is terram habitationis vestrae, quae cruore maculatur; nec aliter expiari potest, nisi per ejus sanguinem, qui alterius sanguinem effuderit.* Ye shall take no satisfaction for the life of a murtherer, which is guilty of death, but he shall be surely put to death: so ye shall not pollute the land wherein you are, for bloud defileth the land, and the land cannot be cleansed of the bloud that is shed therein, but by the bloud of him, that shed it.

And this law is confirmed by Christ himself in the Gospel, and by the last book of holy scripture. *Omnes qui acceperint gladium gladio peribunt. Qui in gladio occiderit, oportet eum gladio occidi.*

But albeit upon the single combate no death ensue nor blood drawn, yet the very combate for revenge is an affray, and a great breach of the kings peace, an affright and terrour to the kings subjects, and is to be punished by fine and imprisonment, and to find sureties for their good behaviour; for it is *vi et armis, et contra pacem domini regis, &c.* and in respect of incroachment upon royall authority for revenge, it is *contra coronam et dignitatem.*

An affray is a publique offence to the terrour of the kings subjects, and is an English word, and so called, because it affrighteth and maketh men affraid, and is enquirable in a leet as a common nufans. See the statute of 2 E. 3. c. 3. where it is; (*en effraier de la pais,*) and the writ grounded upon that statute saith, *In quorundam de populo terrorem*, as it appeareth in F. N. B. fo. 249. f. and the Register agreeth with the originall, and therefore the printed book (*en affray de la peace*) must be amended.

And if any subject by word, writing, or message challenge another to fight with him, this is also an offence before any combate be performed, and punishable by law, and it is *contra pacem, coronam, et dignitatem.* For *quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud.* Or such offenders may be punished in the star-chamber, whereof there be many presidents. Now when an affray is made by single combat, any stander by, that is no officer, may endeavour to part them, and prevent further danger, and the law doth incourage them hereunto; for if they receive any harm by the affrayours, they shall have their remedy by law against them, and if the affrayours receive hurt by the endeavouring only to part them, the standers by may justifie the same, and the affrayours have no remedy by law. But if either of the parties be slain, or wounded, or so stricken, as he falleth down for dead, in that case the standers by ought to apprehend the party so slaying, wounding, or striking, or to endeavour the same by hue and cry, or else for his escape they shall be fined and imprisoned. But if the sherif, justice of peace, constable, or other conservatour of the peace doe not part the affrayers for the preservation of the kings peace, and apprehend them being within his view, or doe not his uttermost endeavour

Brit. c. 25. f. 49. b.

Glouc. 6 E. 1. c. 9. 2 E. 3. ca. 2. 4 E. 3. ca. 13. 14 E. 3. cap. 15. 13 R. 2. St. 2. c. 1. Read these stat.

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* Num. 35. 31. 33.

See before in chapter of murder.

Mat. 26. 52.

Apocal. 13. 10.

Affray.

Trin. 10 E. 3.

Coram rege,

Rot. 87. Northt.

4 H. 6. fo. 10. 8 E. 4. fo. 5.

Regula.

8 E. 2. cor. 295. 22 Aff. pl. 56.

3 H. 7. 10 b.
Bedingfields
case.

Fleta, li. 1. c.
32. §. Duellum.
2. pt. of the In-
stit. W. 1. c. 40.
Fleta ubi supra.

11 H. 3. tit.
Droit. Fitz. 57.

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1 Regum, c. 17.
ver. 4. 5, &c.

2 Rot. Franciæ
7 R. 2. m. 24.
The offer of R.
2. to king
Charles of
France.

1. A single com-
bat between the
two kings.

2. Or a combat
between the two
kings and three
of their uncles
on either side.

3. Or that a fit
day and place
might be assign-
ed when under
the universall
conflict of both
their armies, an
end might be
put to the war.

endeavour to part and apprehend them, they may be fined and imprisoned for their neglect thereof, for they may command others to assist them, and therefore the rule holdeth in them, *idem est facere, et nolle prohibere cum possis: et qui non prohibet, cum prohibere possit, in culpa est*. And if any be commanded to assist them therein, and refuse or neglect the same, it is a contempt in them to be punished by fine and imprisonment.

There is a *duellum* allowed by law depending a suit for the triall of truth, whereof we have spoken in another place, and as here it appeareth, there is a *duellum* against law: of both these an ancient authour saith thus, and first of the lawfull: *Duellum est singularis pugna inter duos ad probandum veritatem litis, et qui vicerit probasse intelligitur, et quamvis judicium Dei expectetur ibidem, quicumque tamen monomachiam, i. e. singularem pugnam sponte susceperit vel optulerit, homicida est, et contrahit mortale peccatum. Et eodem modo judex qui autoritate desert, vel præstat, omnesque accessores, et consulentes, faventes et auxiliantes, nec non et sacerdos qui dat benedictionem*.

In a writ of right, if the tenant wage battail by his champion, and if the champion after become blind by infirmity, and not *ex stultitia*, he shall be discharged of the battail. And if a man be appealed of felony, and gage battaile, and after become blind, *ut supra*, he shall be discharged of the battail, because he becommeth so by the act of God. And if the appellant after battail waged become blinde upon any occasion, the appellee *in favorem vitæ* shall goe quit. When issue is joyned to be tried by battail, and the triall by battail is become impossible by the act of God, or by the default of the appellant, the appellee goeth free.

And this kind of battail, in case of appeals and writ of right, is by publique authority and course of law, whereunto all the people by an implied consent are parties; and (as some hold) hath his warrant by the word of God by the single battail between David and Goliath, which was stricken by publique authority.

King E. 3. in the sixteenth year of his reign, having war with the French king for his right to the kingdome of France, out of the greatnesse of his minde, for love of his subjects, the saving of christian blood, and a speedy tryall of the right, offered the single combat with the French king, but he refused it.

Afterwards also, after long and chargeable wars between the crowns of England and France, for the right of the kingdome of France, it was an honourable offer which king R. 2. made to Charles the French king for saving of Christians guiltlesse blood, and to put an end to that bloody and lingring war, which we will rehearse in the very words of the record it self.

^a *Rex dedit potem. Johanni, duci Lancast' avunculo suo de certis requestis seu oblationibus Carolo regi Franc' faciend', viz. quod negotium bellicum inter prædictos reges finiatur. 1. Per certamen personarum suarum. 2. Vel aliter inter personas suas cum tribus patruis ipsorum ipsis utrinque adjunctis. 3. Aut alioquin quod dies congruus assignaretur et locus, quibus sub universali certamine potentiarum suarum finis bello imponi valeat.* The duke of Lanc' according to his commission made these offers from the king of England to king Charles of France, but he was *auditus, sed non exauditus*; for king Charles liked none of these offers.

And

^b And in *anno Domini* 1196. *anno regni Ricardi primi octavo*, Philip king of France sent this challenge to Richard the first, that king R. would choose five for his part and he the king of France would appoint five for his part, which might fight in lists for triall of all matters in controversie between them for the avoiding of shedding of more guiltlesse blood. King Richard accepted the offer, with condition that either king might be of the number, but this condition would not be granted.

^c These, and the like offers, as they proceeded from high courage and greatnes of mind, so had they been lawfull, if they had been warranted by publique authority.

^b N. Trivet.

^c See the 2. part of the Institutes W. 1. ca. 20.

C A P. LXXIII.

Against going or riding armed.

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Item, **I**T is enacted, that no man, great or small, of what condition soever he be, (except the kings servants in his presence and his ministers in executing *des mandements le roy*, or of their office, and such as be in their company assisting them, and also upon a cry made for armes to keep the peace, and the same in such places where such things happen) be so hardy to come before the kings justices, or other the kings ministers doing their office, with force and armes, nor bring force in affray of the people, nor to goe nor ride armed by night nor by day, &c. before the kings justices, or in any place whatsoever, upon paine to forfeit their armor to the king, and their bodies to prison at the kings pleasure, and to make fine, and ransome to the king, &c.

2 E. 3. cap. 3.
Pasch. 18 E. 3.
Coram rege. Rot.
146. Midd.
8 R. 2. cap. 13.
the printed book
is 7. but it ought
to be 8. and so
recited in 20 R.
2. ca. 1. Lib. 5.
fo. 72. St. Johns
case.

20 R. 2. cap. 1.

Upon this statute two things fall into consideration. First, what the common law was before the making of this statute. Secondly, the true sense and exposition of this act. For it appeareth by a record in 29 E. 1. *quod non liceat torneare, bordeare, justas facere, aventuras guerare, seu ad arma præsumere, sine licentia regis*. See Britton, fo. 29. b. It was called *turneamentum decursus*, of turning and winding, in respect of the agility, as well of the horse, as of the man. For in those daies this deed of chivalry was at randon, whereupon great perill ensued. Therefore in the reigne of E. 3. for safety the tilt was devised. See the statute of 7 E. 2. *De defensione portandi arma*, and the statute of W. 1. cap. 9. & cap. 17. W. 2. cap. 39. and the expositions upon the same.

Pasch. 29 E. 1.
coram rege.
Rot. 101. Essex.
Pasch. 18 E. 1.
coram rege.
Rot. 32. Glouc.

Vet. Mag. Cart.
2. part. fo. 40. b.
Rot. Parl. 6 E.
3. nu. 2. & 3.
13 E. 3. nu. 2.
14 E. 3. nu. 2.
15 E. 3. nu. 2.
17 E. 3. nu. 2.
18 E. 3. nu. 2.
25 E. 3. nu. 50.
Parl. 1 & 25 E.
3. Parl. 2. nu. 5.

It is *lex et consuetudo parliamenti*, that wheresoever the parliament is holden proclamation should be made forbidding wearing of armor, and exercise of playes and games of men, women, or children, in or about the city, or place where the parliament is holden, lest the proceedings in the high court of parliament *pro bono publico*, should thereby be hindred or disturbed.

If

^a 11 H. 7. fo. 23.
vide before cap.
Homicide. Brook
Coron 229. See
24 H. 8. cap. 13.
Justs, Turnies,
Barriers, &c.

^b Pasch. 18 E.
3. Coram rege
Rot. 146. Nota
bene.

^c 25 E. 3. cap. 2.

^d See before cap.
High treason.
verb. *Ou si home
levy guerre.* fo. 9.

^a If any by mutuall assent, do use justs or turneaments, or to play at sword and buckler, or any other deeds of armes, and the one killeth the other, this is felony, for that it is not lawfull to use them without the kings licence; which agreeth with the record abovesaid, of 29 E. 1.

^b *Willus Jordan inventus fuit vagans armatus de platis, attachatus, &c. compertum est per iuratores, quod minatus fuit per quosdam ignotos, et quod pro salvatione vite sue, platas predictas opposuit super corpus suum, tamen invenit sectaritatem pro bono gestu suo.*

^c The clause of the statute of 25 E. 3. concerning this matter, we have reserved to this place, viz.

^d And if per case any man of this realm ride armed covertly or secretly, with men of arms, against any other to slay him, or rob him, or to take and keepe him, till he hath made fine or ransome, it shall not be adjudged treason, but it shall be judged felony or trespassse, according to the lawes of the realme of old time used, and according, as the case requires. And if in such case, or other like, before this time any justices have judged treason, and for this cause the lands and tenements have come into the kings hands as forfeit, the chiefe lords of the fee shall have the escheats of the tenements holden of them, whether that the same tenements be in the kings hands, or in others, by gift, or in other manner. Saving alwayes to our lord the king, the yeare, and the waft, and the forfeitures of chattels, which pertain to him in the cases above-named. And that writs of *scire facias* be granted in such case against the land tenants without other originall, and without allowing any protection in the said suit. And that of the lands which be in the kings hands, writs be granted to the sherifs of the counties, where the lands be, to deliver them out of the kings hands without delay.

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Vide cap. High
treason, verb.
Fait compasser,
fo. 6.

Scire fac.

Note for restitu-
tion. See here-
after cap. Resti-
tution.

W. 1. ca. 9. &
17. W. 2. cap.
39. 18 E. 2. exe-
cution, 251.
19 E. 2. ibid.
247. 3 H. 7. fo.
1 et 10. b. 14
H. 7. 8. Lib. 5.
fo. 91. Semaynes
case.

Concerning the point of felony, it must be observed, that at the making of that statute, and by the lawes of the realme of old time used in such case, when any purposed to slay, and declare it by such overt act, *voluntas reputabatur pro facto*, as hath been said before; and so is this branch concerning that point to be understood.

And that writs of scire fac. be granted.] Here it may appeare what speedy remedy by *scire fac.* the makers of this law gave for restitution to be made, where any of the justices had in any of the cases mentioned in this branch judged it treason, which is declared by this law to be against law.

Now let us peruse the words of the said act of 2 E. 3.

His ministers in executing.] By the order of the common law and statutes of the realme, the sherif, or other minister of the king in execution of the kings writs, or proces of law, might after resistance take *posse comitatus*. For, *sequi debet potentia legem et not antezedere.*

Des mandements le roy.] That is, of the kings writs, and proces of law, *secundum legem et consuetudinem Angliæ.* Though in this act there

there be three special exceptions, yet the law doth make another exception, and that is, to assemble force to defend his house, as hereafter shall be said.

To come before the kings justices, or other the kings ministers doing their office, with force and armes.] Bracton doth notably write of the diversity of forces, viz. that there is *vis expulsiua, perturbatiua, inquietiua, ablatiua, compulsiua*, &c. which you may read in him. And then (which is pertinent to our purpose) he saith: *Est etiam vis armata, (armis dejectum dico qualitercunque fuerit vis armata) non solum si quis venerit cum telis, verum etiam omnes illos dicimus armatos, qui habent cum quo nocere possunt. Telorum autem appellatione omnia, in quibus singuli homines nocere possunt, accipiuntur: sed si quis venerit sine armis, et ipsa concertatione ligna sumpserit, fustes, et lapides, talis dicetur vis armata; si quis autem venerit cum armis, armis tamen ad de-jiciendum non usus fuerit, et dejecerit, vis armata dicitur esse facta; suf-ficit enim terror armorum ut videatur armis dejecisse.* Agreeing with that of the poet,

Jamque faces et saxa volant, furor arma ministrat.

Bracton, lib. 4.
fo. 162.

Virgil.

Britton saith, *Nous volons, que tous gents plus usent judgement, que force.*

Britton, 116. a.

Nor to bring force in affray of the (païs, i.) country.] This act is notably expounded by the writ in the Register, and F. N. B. for by that writ it appeareth, that if any doth enter into, or detaine with force any houses, lands, or tenements, the party grieved may have a writ upon this statute, directed to the sherif, by force of which writ, if the sherif find the force, then if any after procla-mation made, (which proclamation is by reasonable construction to be made for avoiding of bloodshed) shall disobey, or if it be found by inquisition, the sherif is to seize their armes and weapons, and to arrest and take the offenders and commit them to prison, &c. But note the sherif cannot restore the party grieved upon this writ to his possession, ^a no more then he can upon the writ *de vi laica, removenda*, but restitution must be made by force of the statutes of 8 H. 6. and 21 Jac. ^b And yet in some case a man may not onely use force and armes, but assemble company also. As any may assemble his friends and neighbours, to keep his house against those that come to rob, or kill him, or to offer him violence in it, and is by construction excepted out of this act: and the sherif, &c. ought not to deal with him upon this act; for a mans house is his castle, *et domus sua cuique est tutissimum refugium*; for where shall a man be safe, if it be not in his house? and in this sense it is truly said,

Armaque in armatos sumere jura sinunt.

But he cannot assemble force, though he be extreemly threatned, to goe with him to church, or market, or any other place, but that is prohibited by this act.

Nor to goe armed by night, or by day, &c. before the kings justices in any place whatsoever.] Sir Thomas Egett knight went armed under his garments, as well in the palace, as before the justice of the kings bench: for both which upon complaint made, he was ar-rested by sir William Shardshill chiefe justice of the kings bench, and being charged therewith, he said that there had been debate be-tween him and sir John Trevet knight in the same week, at Pauls
in

See the chapter
next before.
verb. *Affraye*.
Registrum.
F. N. B. 249. f.
Nota.
Vide lib. 5. fo.
9. Semaynes case
F. N. B. 54.

^a 8 H. 6. cap. 9.
²¹ Jac. cap. 25.
^b 3. E. 3. cor. 303.
305.
²⁶ Aff. p. 22.
²¹ H. 7. 39.

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²¹ H. 7. 39.
Lib. 5. fo. 91. b.
Semaynes case

²⁴ E. 3. fo. 33.

in London, who menaced him, &c. and therefore for doubt of danger, and safeguard of his life, he went so armed. Notwithstanding the court upon their view awarded, that the armes were forfeited, and thereupon the same were seised, and he commanded to ward in the Marshalsea during the kings pleasure. Sir Thomas prayed to find mainprise, which was denied, untill the pleasure of the king was known, because he was imprisoned during the kings pleasure, according to this statute.

24 E. 3. ubi.
supra. Vide the
4. part of the
Institutes, cap.
Lect. 20 R. 2.
cap. 1. Vid. in-
dorif. claus. 2 E.
2. 19. 22.

Upon paine to forfeit their armor, &c.] It appeareth before by the case of sir Thomas Figett, that the offender was to bee punished according to this act, but by forfeiture of the armor and imprisonment; but the statute of 20 R. 2. cap. 1. doth add fine, and imprisonment.

And that the kings justices, in their presence, &c.] So did sir William Shardishill, as is abovesaid.

And other ministers in their baliwickes, &c.] That is to say, sherifs, bailifs of liberties, &c.

Lords of franchises.] And their bailifs, maiors, and bailifs of cities, and borowes within the same cities and borowes, and borowholders, constables, and wardens of the peace within their wards shall have power to execute this act. And the justices assigned at their comming down shall inquire how such officers, and lords have exercised their offices in this case, and to punish them whom they find that have not done that which pertaineth to their office. See 12 R. 2. cap. 6.

Registrum.
F. N. B. 249. f.
24 E. 3. fo. 33.

Vide 36 E. 3. ca.
9. simile.

It is to be observed, that upon this statute by the resolution of the judges a writ was framed, and inserted into the Register, when any with force and armes enter any lands and tenements, or detaine the same with force and armes, directed to the sherif, reciting the force, and our act, (and saith) *Nos statutum prædictum inviolabiliter observari, et idem infringentes juxta vim et effectum ejusdem statuti castigare facere volentes et punire, tibi præcipimus, &c. publice proclamari facias, &c.* as in the writ. And here is a secret in law, that upon any statute made for the common peace, or good of the realm, a writ may be devised for the better execution of the same, according to the force and effect of the act.

Note, proclamations are of great force, which are grounded upon the laws of the realme.

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C A P. LXXIV.

Of Perjury and Subornation of Perjury, and incidently of Oaths.

5 El. ca. 9.

EVERY person which shall unlawfully and corruptly procure any witnesse to commit any wilfull, and corrupt perjury in any matter or cause depending in suit, and variance, by any writ, action, bill, complaint, or information in any of the kings courts of chancery, star-chamber, or in any of the

the queens majesties courts of record, or in any leet, view of frankpledge, ancient demesne court, hundred court, court baron, or of the stannary, or elsewhere within any of the kings dominions of England or Wales, or the marches of the same: or shall unlawfully, and corruptly procure and suborn any witnesse to testify *in perpetuam rei memoriam*. That then every such offender shall forfeit the summe of forty pound, &c. And if any person either by subornation, or by their own act, consent or agreement, wilfully and corruptly commit any manner of wilfull perjury by their deposition in any of the courts above-mentioned, or being examined *ad perpetuam rei memoriam*; then every person so offending shall lose and forfeit twenty pound, and to have imprisonment by the space of six moneths without bail or mainprise, &c. the one moiety of all which forfeitures to be to the queen, and the other moiety to such person or persons as shall be grieved, &c.

Albeit by the common law tryall of matters of fact are by the verdict of twelve men, &c. and deposition of witnesses is but evidence to them: yet, for that most commonly juries are led by deposition of witnesses, perjury of witnesses was severely punished by the ancient laws of this realm; perjury itself being forbidden by the law of God, ^a *Non perjurabis in nomine meo, nec pollues nomen Dei tui*. And again, *Non perjurabis, reddes domino juramenta tua*.

A false witnesse is called *perjurus, quia perperam jurat*. ^b Perjury before the conquest was punished sometime by death, sometime by banishment, and sometime by corporall punishment, &c.

^c *Ascuns sont punies per cowper de langues, come soiloit estre de faux tesmoignes*. But too severe laws are never duly executed. Afterwards it came to be more milde, for ^d Fleta saith, *Atrax injuria est quæ omnium mobilium amissionem confert, &c. de perjurio convictis*.

Afterwards it came to fine and ransome, and never to bear testimony.

Et queux se voillont perjurer pur lower, ou par ascun doute de ascun, et ceux sont reints a nostre volunt, et mes ne soient crus per nul serement. And it appeareth in 7 H. 6. that he that is perjured shall be fined and imprisoned.

Thomas Vigrus, et duo alii sunt culpabiles, &c. perjurati pro fractione corbellorum Johanne de Huntingfield in separali piscaria sua in aqua de Hadfeld.

Qui testes de perjurio convincere satagit, multo illis plures, producere necesse habet.

The punishment of perjury in jurors for a false verdict was so severe by the common law, as few or no juries were upon just cause convicted, for the judgement * against them was, 1. *Quod amodo amittant liberam legem imperpetuum*. 2. *Non trahantur in testimonium veritatis*. 3. *Bona et catalla sua forisfaciant regi*. 4. *Terræ et tenementa sua capiantur in manus regis*. 5. *Quod uxores et liberi sui amodo amoveantur*. 6. *Quod terræ et tenementa sua extirpentur, &c.*

245. 8 E. 2. Judgement. 196. 16 E. 3. ibidem 109. Mich. 3 H. 5. Coram & 49. Fortescue ca. 29.

^a Exod. 20. 13.

Levit. 19. 11.

Mat. 5. 34.

^b Leges Edw. c.

3. Ethelst. c. 10.

25 Edm. c. 6.

Canuti, ca. 6.

& 35. &c.

Edw. and Gru.

c. 11.

^c Mir. ca. 4. §

de paines.

Int. Leg. Ca-

nuti, c. 15. Con-

vinciatori lingua

exciditor.

^d Fleta, li. 2. ca.

1. § Item Atrax,

&c.

Britton, fo. 38.

237, 238.

7 H. 6. fo. 25.

Hil. 8 E. 1. in

Communi banco

Rot. 38. Essex.

Fortescue, ca.

32.

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Vide 1. pt. of

the Institutes.

Verb. Attaint.

Sect. 514. Glan-

vill, lib. 2. ca.

19. 6 H. 3. At-

taint. 72. Bract.

li. 4. fo. 292. b.

Fleta, lib. 5. cap.

21. Britton, fo.

rege Rot. 14.

7. Quod

23 H. 8. ca. 3.

2 H. 4. 10.

11 H. 4. 88.

20 E. 4. 10. b.

22 E. 4.

13 El. Dier, 302.

Mich. 7 & 8 El.

Dier, 242, 243.

Mich. 10. Ja.

Rowl. Ap Eli-

zaes case, in

cam. stellat.

See hereafter

Verb. Informa-

tion.

Mich. 40 & 41

El. Lib. 5. fo. 99.

in Flowers case.

The case of
Rowland ap Eli-
za in the star-
chamber ubi su-
pra.

7. *Quod capiantur, et in gaolam detrudantur.* Which sheweth how odious perjury was in the eye of the law: and this law doth yet remain in force; but a milder punishment is set down by the statute of 23 H. 8. wherein the party grieved hath election to ground his writ of attain upon this statute, or to take his remedy at the common law.

For perjury concerning any temporall act, the ecclesiasticall court hath no jurisdiction; and if it be concerning a spirituall matter, the party grieved may sue for the same in the star-chamber. See the statutes of 3 H. 7. ca. 1. 11 H. 7. ca. 25. 32 H. 8. ca. 9. And when you have read the case in Mich. 7 & 8 Eliz. Dier 242, 243. you will confesse how necessary the reading of ancient authors and records is, and the continuall experience in the star-chamber is against the opinion conceived there.

And Mich. 10. Jac. in the star-chamber in the case of Rowland Ap Eliza, it was resolved, that perjury in a witnes was punishable by the common law, as hereafter shall be shewed more at large. But now let us peruse the words of the statute.

By any writ, action, bill, complaint, or information.] Out of these words are perjury, and subornation of perjury upon an indictment for the king (for example of riot) as it was resolved in Flowers case, because that perjury upon an indictment is not within the statute. But seeing perjury was an offence punishable by the common law, though the indictment of Flower grounded upon this statute was overthrown, yet is such perjury upon an indictment punishable, and most commonly punished in the star-chamber.

Information.] By this it appeareth, that perjury committed in an information exhibited by the kings attorney, or any other for the king, by any witnes produced on the behalf of the king, is punishable either by this act or by the common law. And so it was resolved in the said case of Rowl. Ap Eliza, which was this. The kings attorney preferred an information in the exchequer against Hugh Nanny esquire the father, and Hugh Nanny the son, and others for intrusion and cutting down a great number of trees, &c. in Penrose in the county of Merioneth. The defendant pleaded not guilty, and the tryall being at the bar, Rowl. Ap Eliza was a witnesse produced for the king, who deposed upon his oath to the jury, that Hugh the father and Hugh the son joyned in sale of the said trees, and commanded the vendees to cut them down: upon which testimony the jury found for the king, and assessed great damages, and thereupon judgement and execution was had. Hugh Nanny the father exhibited his bill in the star-chamber at the common law, and charged Rowland Ap Eliza with perjury, and assigned the perjury, in that he the said Hugh the father never joined in sale, nor commanded the vendees to cut down the trees, &c. And it was resolved, first, that perjury in a witnesse was punishable by the common law. Secondly, that perjury in a witnesse for the king was punishable by the common law, either upon an indictment, or in an information, or by this act in an information. And the said Rowland Ap Eliza was by the sentence of the court convicted of wilfull and corrupt perjury.

But for our more orderly proceeding, let us define, or describe what perjury is in legall understanding, both upon this statute, and at the common law.

Perjury

Perjury is a crime committed, when a lawfull oath is ministred by any that hath authority, to any person, in any judicall proceeding, who sweareth absolutely, and falsly in a matter materiall to the issue, or cause in question, by their own act, or by the subornation of others. Now let us peruse the branches of this description.

A lawfull oath.] This word oath is derived of the Saxon word *eoþ*; and is expressed by three severall names, viz. 1. *Sacramentum*, à *sacra*, et *mente*, because it ought to be performed with a sacred and religious mind. *Quia jurare, est Deum in testem vocare; et est actus divini cultus.* 2. *Juramentum à jure*, which signifieth law and right, because both are required and meant, or because it must be done with a just and rightfull mind. 3. *Jusjurandum*, compounded of two words, *à jure*, et *jurando*. In the common law *sacramentum* is most commonly used: in our books and ancient statutes published in French, *serement*, of the French word *serment*, is used.

An oath is an affirmation or deniall by any Christian of any thing lawfull and honest, before one or more, that have authority to give the same for advancement of truth and right, calling Almighty God to witnesse, that his testimony is true. And it is twofold, either *assertorium ut de præterito, sicut testes, &c. seu promissorium de futuro, sicut judices, justiciarii, officarii, &c.* So as an oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same cannot be ministred to any, unlesse the same be allowed by the common law, or by some act of parliament; neither can any oath allowed by the common law or by act of parliament be altered, but by act of parliament. It is called a corporall oath, because he toucheth with his hand some part of the holy scripture.

The oath of the kings privy councill, the justices, the sherif, &c. was thought fit to be altered and enlarged, but that was done by authority of parliament. For further proof whereof, and of the matters abovesaid, see the statutes here quoted, and it shall evidently appear, that no old oath can be altered, or new oath raised without an act of parliament, or any oath ministred by any that have not allowance by the common law, or by an act of parliament.

2 H. 5. ca. 7. 8 E. 4. cap. 2. 1 R. 3. cap. 6. & 15. 19 H. 7. cap. 14. 14 H. 8. cap. 5. 32 H. 8. cap. 46. 2 E. 6. ca. 13. 27 El. cap. 12. See 3 Jac. c. 4.

And to conclude this point, it was resolved in parliament holden in anno 43 Eliz. that the commissioners concerning policies of assurances could not examine upon oath, because they had no warrant either by the common law, or by any act of parliament: and therefore it was enacted at that parliament, that it should be lawfull for the said commissioners to examine upon oath any witnesse, &c. At this parliament I attended, being then attorney generall. And oaths that have no warrant by law, are rather *nova tormenta, quam sacramenta*, and it is an high contempt to minister an oath without warrant of law, to be punished by fine and imprisonment. And therefore commissioners (that set by force of any commission that is not allowed by the common law, nor warranted by authority of parliament) that minister any oath whatsoever, are guilty of an

III. INST.

O

high

Perjury described.

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Serment or sacrament. i. sacrament. i. sacramentum.

Fleta, li. 5. ca. 2. Brit. c. 97. fo. 237. 8. b. 19. 74. 134. 165. 236. b. Fleta, li. 5. ca. 21.

So resolved an. 26 El. in the case of the under sherif.

Magna Cart. c. 6. Stanf. Pr. 17. F. N. B. 264. W. 1. 3 E. 1. c. 40. 18 E. 3. ubi sup. 5 R. 2. cap. 12. 6 R. 2. ca. 12. 4 H. 4. ca. 18. ca. 2. 23 H. 8.

43 Eliz. ca. 12.

* Commissions.

Regist. 1, 2, 3.

125, 126. 88.

128. 138. 161.

F. N. B. 110,

111. 2 E. 3. 26.

Pasch. 44 E. 3.

Coram rege. Rot. 2. 24 E. 3. Com. Br. 3. 29 E. 3. 30, 31. 18 E. 3. ca. 1 & 4. 18 E. 3. Stat. 2.

ca. 6. Rot. Parl. 18 E. 3. nu. 47. 28 E. 3. ca. 19. Rot. Parl. 50 E. 3. nu. 56. 61. 2 H. 4. nu. 22.

optime. 4 H. 4. ca. 9. Rot. Parl. 9 H. 4. nu. 36. 42 Aff. p. 5. 12. 42 E. 3. ca. 3. Dier, 1 Eliz.

106. Scrogs case.

high contempt, and for the same are to be fined and imprisoned :

* For commissions are legall, and are like the kings writs, and none are lawfull but such as are allowed by the common law, or warranted by some act of parliament : and therefore commissions of new inquiries or of novell invention, are against law, and ought not to be put in execution.

And albeit divers of the kings courts in England proceed not according to the course of the common law, yet are their proceedings allowed either by the common law or by some act of parliament.

Dorff. claus. an.

19 R. 2. nu. 17.

* Exod. 20. 4.

Deut. 5. 6.

Psalme 86. 11.

96. 7. 115. 4.

Levit. 26. 1. &c.

Esay 44. 9. &c.

Jeremy 10. 3.

&c. Sapient. 13.

10. &c. August.

Epist. 110. ad

Jan. ca. 11. idem de fide & symbolo, ca. 7. idem in Psal. 113. con. 2. Gregor. lib. 9. Epist. 9.

Certain poor Christians that had spoken against the worshiping of images, were by the bishops sworn to worship images ; * which oath was against the expresse law of God, and against the law of the land, for that they had no † warrant to minister the same. Let the children of the church be called and instructed by the testimonies of the holy scripture, that nothing made with hands may be worshipped. See the second part of the Institutes, Marlbridge, cap. 14. & 19. concerning oathes, and specially out of Glanville, concerning the nobility of this realm, and W. 1. ca. 38.

† [166]

Braeton, lib. 4.
fo. 186.

Jer. 4. 2.

Trin. 13 Ja. Li.
11. f. 98. Bag-
ges case.

By any having authority.] For where the court hath no authority to hold plea of the cause, but it is *coram non iudice*, there perjury cannot be committed. For as Braeton saith, *Sacramentum habet in se tres comites, veritatem, justitiam et iudicium: veritas habenda est in iurato; justitia et iudicium in iudice.*

And all this is grounded upon the law of God, *Jurabis vivit dominus, in veritate, et iudicio, et in justitia.*

In any judiciall proceeding.] For though an oath be given by him that hath lawfull authority, and the same is broken, yet if it be not in a judiciall proceeding, it is not perjury punishable either by the common law, or by this act, because they are generall and extrajudiciall, but serve for aggravation of the offence, as general oathes given to officers or ministers of justice, citizens, burgeses, or the like, or for the breach of the oath of fealty or allegiance, &c. they shall not be charged in any court judiciall for the breach of them afterwards. As if an officer commit extortion, he is in truth perjured, because it is against his generall oath: and when he is charged with extortion, the breach of his oath may serve for aggravation.

If a man calleth another perjured man, he may have his action upon his case, because it must be intended contrary to his oath in a judiciall proceeding: and so it is termed in our statute of 5 Eliz. but for calling him a forsworne man, no action doth lye: because the forswearing may be extrajudiciall. If the defendant perjureth himself in his answer in the chancery, exchequer chamber, &c. he is

is not punishable by this statute, for it extendeth but to witnesses, but he may be punished in the star-chamber, &c.

Who sweareth absolutely.] For the deposition must be direct and absolute, and not *ut putat*, nor *sicut meminit*, nor *ut credit*, &c.

And falsely.] Herein the law taketh a diversity between falsehood in expresse words, and that is only within this statute, and falsehood in knowledge or minde, which may be punished though the words be true. For example, damages were awarded to the plaintife in the star-chamber according to the value of his goods riotously taken away by the defendant: the plaintiffe caused two men to sweare the value of his goods, that never saw nor knew them; and though that which they sware was true, yet because they knew it not, it was a false oath in them, for the which both the procurer and the witnesses were sentenced in the star-chamber.

For (as Fleta saith) *Ad rectum juramentum exiguntur tria, veritas, conscientia, et judicium*: truth and conscience in the witness, and judgement in the judge. And herewith agreeth Bracton, that a man may sweare the truth, and yet be perjured. *Dicunt quidam verum, et mentiuntur, et pejerant, eo quod contra mentem vadunt. Ut si Judæus juraverit Christum natum ex virgine, perjuriū committit, quia contra mentem vadit, quia non credit ita esse ut jurat.*

By the ancient law of England in all oathes equivocation is utterly condemned; for Britton saith, *Serement est honest, et leall, quant sa conscience demesne accord a chescun point a la bouche ne plus, ne meins, et sil ad discord, donqs' est perillous.* And this is grounded upon the law of God. *Nunquid Deus indiget mendacio vestro, ut pro illo loquamini dolos, aut decipietur ut homo vestris fraudulentis? Perjuri sunt qui servatis verbis juramenti decipiunt aures eorum qui accipiunt.* If equivocation should be permitted tending to the subversion of truth, it would shake the foundation of justice.

In a matter materiall to the issue, or cause in question.] For if it be not materiall, then though it be false, yet it is no perjury, because it concerneth not the point in suit, and therefore in effect it is extrajudiciall. Also this act giveth remedy to the party grieved, and if the deposition be not materiall, he cannot be grieved thereby. And Bracton saith, *si autem sacramentum fatuum fuerit, licet falsum, tamen non committit perjuriū.*

By their own act, &c.] This clause of the statute, although it be more generall then the clause of procurement, yet seeing the first clause concerning procurement, extendeth not to perjury upon an indictment: this clause by construction shall extend no further than the former. See Lib. Intr. Coke, fo. 164, 165, 362.

Or by the subornation of other.] Subornation is derived of *sub* and *orno*, and *ornare* in one of his significations is to prepare, so as *subornare* is as much to say, as to prepare secretly, or underhand. *Est autem subornare quasi subtus in aure ipsum male ornare, unde subornatio dicitur de falsi expressione, aut de veri suppressione.* And here is to be noted, that in the judgement of the parliament *plus peccat author quam actor*; for the suborner forfeits 40 li. and he that is suborned but 20 li. Fleta saith, *Si servus cogatur scienter à domino perjurare, uterque est perjurus; qui autem provocat eum ad jurandum quem scit*

Bract. lib. 4.
fol. 289.
Fleta, lib. 5.
ca. 21.

Gurneis case in
the star-cham-
ber, Mic. 9 Jac.

Fleta, ubi supra.

Bracton, lib. 4.
fo. 289.

Equivocation.
Britton, fo. 237.

Job 13. 7.

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Bracton, lib. 4.
188. Fleta, lib.
5. ca. 21. accord.

Flowers case,
ubi supra.

Fleta, lib. 5.
ca. 21.

falsum jurare, vel exigit, vel recipit juramentum, talis vincit homicidam, quia homicida solum corpus occidit, iste vero animam suam et alterius: et peccat, qui alium audit falsum jurare, scit, et tacet.

Mic 29 & 30
Eliz. coram rege.

In an action of perjury brought upon this statute, the plaintife counted, that the defendant *falso dixit et deposuit*, &c. and in what action, upon what issue, and in what court, &c. and concluded, *et sic commisit voluntarium et corruptum perjurium*. And it was ruled by the whole court, that the count was vicious and insufficient for two causes. First, for that in this act of 5 Eliz. as here it appeareth, there be two distinct clauses, one if he be perjured of his own proper act; the other if he be perjured by subornation, &c. and the plaintife ought to declare in certainty, within which of them the defendant is perjured. The second cause was, where the act saith [wilfully and corruptly commit any wilfull perjury, &c.] and the words of the count be *falso dixit et deposuit*: and saith not, *voluntarie et corrupte*; and the said clause, *et sic commisit voluntarium et corruptum perjurium*, saveth not the former insufficiency, because it is but a conclusion upon the former matter.

27 Eliz. Mellers
case.

And the like judgement was given in this court, as to this latter point anno 27 Eliz. in the case of one Mellers of Lincolneshire.

Dier, 12 El. 288.

That as well the judge and judges of every such of the said courts.] If the perjury be committed by any witness deposed in the chancery, &c. and the party grieved commenceth his suit there upon this act, the same and all the proceedings thereupon must be in Latin according to the course of the common law, and the defendant shall not be sworn to his answer, nor examined upon interrogatories (unlesse the court of chancery had before this act used to examine perjuries, and to examine the defendant upon oath upon interrogatories before this act, for then such jurisdiction had been saved by a proviso in this act) and when issue is joined, it shall be tried in the kings bench, as by law it ought, *et sic de similibus*.

25 E. 3. 42. b.
cor. 131.

If a man be taken for a suspect, and he is not indicted, nor is there any certaine cause to arraign him, the court may give him the oath of allegiance, viz. *Que il serra foial et loyal*, &c. Vide 45 E. 3. 17. b. simile devant, cap. 7. De Conjuracion, &c. in fine. 22 E. 4. 36. 20 H. 6. 37. Attorney abjure.

See more of Perjury and of Witnesses in the fourth part of the Institutes, cap. Commissioners for examination of witnesses. See 21 Jac. cap. 20. a good act to prevent and reforme profane swearing.

C A P. LXXV.

Of Forging of Deeds, &c.

IF any person or persons upon his or their own head or imagination, or by false conspiracy or fraud with others, shall wittingly, subtilly, and falsely forge (1), or make (2), or subtilly cause or wittingly assent (3) to be forged or made any false deed, charter (4), or writing sealed (5), court roll, or the will of any person or persons, in writing (6), to the intent that the state of freehold or inheritance of any person or persons, of, in, or to any lands, tenements, or hereditaments free-hold or copy-hold, or the right, title, or interest of any person or persons of, in, or to the same (8), or any of them, shall or may be molested, troubled, defeated, recovered, or charged, &c. (7) Or shall pronounce, publish, or shew forth in evidence any such false and forged deed, charter, writing, court-roll, or will, as true (9), knowing the same to be false and forged (10), as is afore said, to the intent above remembered, and shall be thereof convicted, either upon action or actions of forger of false deeds to be founded upon this statute, at the suit of the party grieved, or otherwise according to the order and due course of the lawes of this realme, or upon bill, or information, to be exhibited into the court of star-chamber, &c. shall pay to the party grieved his double costs and damages, &c. (11) And be it further enacted, that if any person or persons, upon his or their owne head or imagination, or by false conspiracy or fraud had with any other, shall wittingly, subtilly, and falsely forge or make, or wittingly, subtilly, and falsely cause or assent to be made or forged, any false charter, deed (12), or writing, to the intent that any person, or persons, shall or may have or claime any estate or interest for terme of yeares (13) of, in, or to any mannors, lands, tenements, or hereditaments, not being copy-hold (14), or any annuitie (15) in fee-simple, fee-taile, or for term of life, lives, or years, or shall make or forge, as is afore said, any obligation, or bill obligatory (16), acquittance, release, or discharge (18), of any debt, account, action, suit, demand, or other thing personall, or shall pronounce, &c. *ut supra*. That then he shall pay, &c. (19)

And be it further enacted, that if any person or persons being hereafter convicted or condemned of any of the offences afore said, &c. shall after any such his or their conviction or condemnation eftsoons commit or perpetrate any of the said offences

fences (20) in forme aforefaid, that then everyfuch fecond offence or offences fhall be adjudged felony, &c.

We have fpoken of forgery or counterfeiting of the great feale of the kings coin, &c. which are declared by the statute of 25 E. 3. to be high treason: now we are to treat of forgeries of deeds, charters, and writings fealed, &c. in the cafe of fubjects. And firft, after our accuftomed manner how thefe offences were punifhed of ancient time.

Mir. cap. 4.
§ Des paines.
Et cap. 5. § 1.

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Britton, fo. 16.
a. & b.

The Mirror faith, *Afcuns peches font punies p. pde. de poulce, come eft de faux notoires, &c. peccans membrum puniebatur. (Car pur fauxer de feale ne ferr' judgement mortel.)*

Britton faith, *Judgement d'ee meyne, et de fuffer mort doit encourir ceux courre, q. p. appeales de felony font atteints, q. ilz eyent le feale leur feigniour, qui mainpast ils font, ou q. homes p. homage counterfait, ou autrement faufe, &c. Et fi tiels manners des faits soient atteints a nostre fuit, fi soient pur le jeale faufe juges a judgement de pillory, ou de perdre le oraile fi le fait soit simple: et fi le fait soit grand et leyde, ficome touchant disherifon ou perpetuall damage, fi soient juges a la mort.*

Fleta, lib. 1.
ca. 22,

Fleta, lib. 2.
ca. 1,

Fleta faith, *Crimen falsi dicitur, cum quis accusatus fuerit vel appellatus quod sigillum regis, vel domini sui de cujus familia fuerat, falsaverit, et breviam inde consignaverit; vel cartam aliquam vel literam ad exheredationem domini, &c. sigillaverit; in quibus causis si quis convictus fuerit, detractari meruit et suspendi. Et quod de hujusmodi falsariis dicitur, de si illa adulterina cartis et literis apponentibus dicatur id idem. And in another place he saith, Est etiam atrox injuria quæ perpetuam inducit infamiam cum pœna pillorari vel tumbrelli, quæ quandoque fit per falsarios sigillorum (dum tamen non regis nec domini sui de cujus fuerit familia.)*

We have the more willingly repeated these ancient punishments, to shew how in part, (viz. concerning the eares and pillory,) this act for the first offence concurreth with the ancient punishment.

(1) *Forge.*] To forge is metaphorically taken from the smith, who beateth upon his anvill, and forgeth what fashion or shape he will: the offence (as it appeareth before) is called *crimen falsi*, and the offender *falsarius*, and the Latin word to forge is *falsare* or *fabricare*. And this is properly taken when the act is done in the name of another person.

26 H. 6, forger
8. 27 H. 6. 3.

The statute of 1 H. 5. hath these words [forge of new any false deed.] And yet if A make a feoffment by deed to B, of certaine land, and after A maketh a feoffment by deed to C of the same land with an antedate before the feoffment to B; this was adjudged to be a forgery within that statute, and by like reason within this statute also: and the rather in respect of the words subsequent, [or make, &c.]

(2) *Or make, &c.*] These be larger words then to forge: for one may make a false writing within this act, though it be not forged in the name of another, nor his seale nor hand counterfeited. As if A make a true deed of feoffment under his hand and seale of the manner of Dale unto B, and B or some other rase out D the first letter of Dale, and put in S, and then where the true deed was of the mannor of Dale, now it is falsely altered and made the

the mannor of Sale. This is a false writing under seale within the purview of this statute. And so it is if a rent charge of one hundred pounds by the year be granted out of land in fee or for life, &c. and the grantee or any other rase out one, and in stead thereof writeth two; this is a false writing within the danger of this statute.

(3) *Or subtilly cause, or wittingly assent.*] To cause, is to procure or counsell one to forge, &c. To assent, is to give his assent or agreement afterwards to the procurement or counsell of another: to consent, is to agree at the time of the procurement or counsell, and he in law is a procurer.

(4) *Deed, charter, or writing sealed.*] It is required, that the deed, charter, or writing must be sealed; that is, have some impression upon the wax, for *sigillum est cera impressa, quia cera sine impressione non est sigillum*; and no deed, charter, or writing, can have the force of a deed without a seale.

(5) *Writing sealed.*] These are large words: for the making of a false customary of a mannor in writing under seale, containing divers false customes tending to the disherison of the lord of the mannor, and that the same had been allowed and permitted by the lords of the mannor, &c. which was also false, was resolved to be within these words, [a false writing sealed.]

(6) *Court roll, or the will of any person or persons in writing.*] Here be two kind of muniments that need not be sealed, because they may take effect without any seal, for that they be deeds; as court rolls concerning grants, surrenders, admittances, &c. of copy or customary lands: and the last will in writing. If any person which writeth the will of a sick man inserteth a clause in his last will, concerning the devise of any lands or tenements, which he had in fee-simple, falsly without any warrant, or direction of the divisor: albeit he did not forge, or falsly make the whole will, yet is he punishable by this statute, as it hath been often holden in the star chamber against the opinion reported by my lord Dier.

(7) *To the intent that the state of freehold or inheritance, of or in any lands, tenements, or hereditaments, freehold or copyhold, shall or may be molested, troubled, defeated, recovered, or charged*] The great doubt upon this branch, and of the branch hereafter ensuing, was, for that it is not expressed by this act, what estate, or interest should be mentioned to passe by the deed, charter, &c. whereby the estate of the freehold or inheritance should or might be molested, &c. or charged; whether if one did forge, &c. a deed, charter, &c. of an interest, or term of a hundred or a thousand years, &c. of lands, which are the freehold or inheritance of another, whereby the same shall or may be molested, &c. And the same question of a rent charge for years in the like case; and the doubt was the greater in respect of the clause hereafter ensuing, which is, To the intent that any person or persons shall or may have or claim any estate or interest for term of years of in or to any mannors, &c. And it was resolved, that a lease or charge for years of any lands being the freehold or inheritance of any person, was within this branch, for the clause is generall, not mentioning any estate or interest, &c. whereby the molestation, &c. should grow: and it was requisite it should extend to leases or charges for years, for otherwise mens estates of freehold or inheritance, &c. might be of little or no value:

Pasch. 15 Eliz.
Dier. 322 James
Taverners case.
In camera stel-
lata.

[170]

Dier 12 El. f.
288. Sir James
Marvyns case.

Pasch. 38 Eliz.
in camera stel-
lata the lady
Greshams case.

and accordingly it was resolved, Pasch. 38 Eliz. in the star-chamber between the lady Gresham plaintiff, and Roger Booth scrivener of London, Markham and others defendants, for the forging of a grant of a rent charge, by deed bearing date *anno* 21 Eliz. for ninety nine years to the said Markham out of all sir Thomas Greshams lands of inheritance, and for publication thereof; and sentence given upon the said branch accordingly against Roger Booth for publication of the same.

And the said branch after ensuing, is to be understood when the forgery, &c. is to the molestation of a termor. As if A. be possessed of a lease of lands for years, and B. in his name doth forge an assignment to C. of his term, this is directly within the letter and meaning of this branch, and the rather in respect of those things that be joyned therewith under the same punishment.

Vide 4 H. 6. 25.

8 H. 6. 33.

20 H. 6.

33 H. 6. 23.

15 E. 4. 24.

Pl. com. 88.

(8) *Or the right, title, or interest of any person or persons in or to the same.*] These words were added, for that the statute of 1 H. 5. being to undoe, and trouble the possession and title (in the conjunctive) of the said kings liege people: doubt was made whether a forgery to bar one that had but a bare right or title, and no possession, was within that statute: and therefore this clause of 5 Eliz. added this clause in the disjunctive, as here it appeareth. But now by a speciall branch of this act the statute of 1 H. 5. cap. 3. being doubtfully penned, is repealed by a clause in this act, and greater punishment inflicted by this statute.

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(9) *Or shall pronounce, publish, or shew forth in evidence any such false and forged deed, &c. as true knowing the same to be forged.*] Here be two things to be explained: first, what it is to pronounce, or publish as true. Secondly, what knowledge is sufficient.

To pronounce or publish is, when one by words or writing pronounceth or publisheth the deed, &c. to any other as true.

(10) *Knowing the same to be forged.*] This knowledge may come by two means, either of his own knowledge, or by the relation of another. As if A. telleth B. that such deed is false and forged, and yet B. will after pronounce or publish this to be a true deed, and afterwards it falleth out by proof that the relation of A. was true, and the deed in truth was forged, B. is in the danger of this statute: and so was it resolved in the abovesaid case of the lady Gresham, against Roger Booth, &c. *ubi supra*, and sentence given accordingly.

Dier 15 Eliz.
Taverners case,
ubi supra.

(11) *And that the defendant shall suffer upon the pillory the corporall penance, &c.*] And there is a clause that the plaintiff should not release nor discontinue the punishment, &c. but only costs and damages; and yet it was resolved that the queen might pardon the corporall punishment, which trencheth to common example.

Pasch. 34 E. 3.
Coram rege,
Rot. 30. Kane
the case of Godi-
tha Waldish.
Dier 7 El. 231.

And upon the statute of W. 2. ca. 25. which giveth two years imprisonment in the ravishment of ward, the king may pardon the said corporall punishment of imprisonment. And the punishment of finding of surety, and forjuring the realm, &c. upon the statute of W. 2. cap. 28. *De malefactoribus in parvis* may be pardoned by the king.

(12) *Any false charter or deed.*] This must be intended to be sealed according to the former clause, though it be not here specified.

Pl. com. 80. b.

(13) *To the intent that any person or persons shall or may have or claim any*

any estate or interest for term of years.] This branch hath been explained before in the former part of this statute.

(14) *Not being copy hold.]* This needeth no explication.

(15) *Or annuity.]* This is evident.

(16) *Any obligation, or bill obligatory.]* These must be intended to be sealed: if a man forge a statute staple, or a recognisance in the nature of a statute staple, that is, acknowledge them, or either of them in the name of another; these are obligations within this act, for each of them hath the seal of the party. But otherwise it is of a statute merchant, or of a recognisance, because they have not the seal of the conusor.

F. N.B. 96. b.
c. & 10. a.

15 H. 7. 15, &c.

(17) *Or writing.]* This extends to a testament in writing, whereby the term for years or goods and chattels be devised, and the former branch extendeth to a will in writing, concerning freehold and inheritance.

Dier, 13 Eliz.
392. b.

(18) *Acquittance, release or discharge.]* Lodowick Grevil esquire was bound by recognisance of two hundred pound, to Rowland Hinde of the Inner Temple, for payment of one hundred pound. Hinde wrote a letter to Grevil, and writ his name in the lowest part of the letter; (as many use when they write to men of great calling) Grevil caused the letter to be cut off, and a generall release in few words to be written above Hindes name, and took off Hindes seal, and fixed it under the release: so there was Hindes hand and seal to this release. Hinde being not paid his hundred pound, brought a *scire fac'* upon the recognisance, whereunto Grevill pleaded this release, Hinde pleaded *non est factum*, and tried his deed, whereupon judgement was given against him, whereby Hinde was barred of his debt. For this forged release Grevil was sentenced in the star-chamber upon this statute.

Mich. 13 & 14
El. in camera
stellata inter
Hinde and
Grevill.

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(19) *Shall pay to the party grieved, his double damages.]* Upon these words in the case aforesaid, between Hinde and Grevill, the question was, whether Hinde should have double damages in respect of the penalty, viz. the two hundred pound, or of the hundred pound, the due debt appearing in the condition of the recognisance. And it was resolved, that damages should be assessed by the court to double the penalty, for the penalty should be recovered by law if the forged release had not been; and this was reported by the lord Dier, and imprinted, and since omitted out of the print.

(20) *Being hereafter convicted or condemned of any of the offences aforesaid, shall, &c. estfoons commit, &c. any of the said offences.]* Here be four kind of offences; the first concerning molestation, &c. of freehold and inheritance. Secondly, the publication of the same knowing, &c. The third concerning a term for years, annuities, and demands personals. Fourthly, the publication thereof.

Now the question upon this branch concerning felony, was, that whereas the said Roger Booth was convicted in the star-chamber for the publishing of the forged grant by deed of a rent charge of a hundred pound *per annum*, as is aforesaid; afterwards the said Roger and others were charged in the star-chamber with the forging of a deed of feoffment in the name of sir Thomas Gresham bearing date 20 Eliz. but forged long after: whether this second forgery was felony, or no, within this branch; and the doubt did arise upon the said words [*estfoons*] commit any of the said offences. And it was

Pasch. 7 Ja. In-
ter fir Will.
Reade pl. and
Rogerum Booth
et alios def. in
camera stellata.

Cicero, lib. 1.
de Invent.

was objected, that by reason of this word [*estfoons*] *iterum*, the second offence must be of the same nature as the first offence was; as the first offence being for publication of a forged deed, &c. the second offence must be for the publication of another forged deed, &c. and upon that branch whereupon the first offence was grounded, or else it was said, it was not *iterum*, which word was in signification *quasi iter unum*, that is to say, *per idem iter*, and it is so taken for the second time. *Primo quidem decipi, incommodum est, iterum stultum, tertio turpe*: which doubt was referred to the considerations of the two chief justices, and chief baron, who upon hearing of counsell learned of both sides, and upon conference, and consideration had of this act, resolved, that the second offence was felony within the words, and meaning of this act, for the words be expressly, being condemned of any of the said offences, *estfoons* commit any of the said offences. So as by reason of these words, any of the said offences, this word [*estfoons*] is well satisfied, if he commit the second time any of them: and so these words any of the said offences extend to any of the said four offences before mentioned. And it was also resolved by them, that by reason of this word [*estfoons*] the second forgery, &c. must be committed after the first conviction, or else it is no felony.

Provided always, &c. that if any person, &c. hath of his own head, &c. forged or made, &c. or if any person, &c. hath heretofore published or shewed forth any false deed, &c.

Trin. 11 El.
Dier in a manu-
script not
printed.

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Hanford before this statute forged a lease for years of the land of the lord Williams of Tame, which lease after by Weynman (which hath married one of the daughters and heirs of the said lord Williams) was impeached, but not as forged, and by composition for two hundred pound was redeemed by Weynman, and the lease was cancelled. And after Weynman perceiving the lease to be forged, sued Hanford in the chancery to have restitution of the two hundred pound, and there Hanford after this statute of 5 Eliz. maintained the lease as good and true: whereupon Weynman sued Hanford in the star-chamber, where by the opinion of the chief justices it was holden, that it was not within this statute, because that the deed was cancelled, and Hanford made no title to the interest of the term.

Provided always, &c. that this act or any thing therein contained, shall not extend to any person that shall plead or shew forth any deed or writing exemplified under the great seal of England, or under the seal of any other authentique court of this realm, nor shall extend to any judge or justice, or other person that shall cause any seal of any court to be set to such deed, charter or writing enrolled, not knowing the same to be false or forged.

Mich. 10 Jacobi
regis in com-
muni banco in a
prohibition be-
tween Tho.
Read pl. and
Avis Hide, and
Rich. Hide de-
fendants.

This must be intended of a deed or writing, which by law may be exemplified: for the knowledge whereof we will report a resolution of the whole court of the common pleas. The issue between the said parties to be tried at the bar was, whether the last abbot of Abbingdon, and all his predecessors, &c. held certain lands in the parish

parish of Saint Ellens, &c. discharged of the payment of tithes: and the plaintiff offered to shew in evidence to prove the said land to be discharged of payment of tithes, a *vidimus*, or *innotescimus* under the great seal in these words: *Vidimus quendam antiquum librum in pergamento intitulum volumen de copiis munimentorum seu diversorum gestorum, et actuum monasterii de Abbingdon.* In which book was a copy of a bull of the pope, for the discharge of the said land for payment of tithes, which was but part (amongst other things) of the said book. And by the opinion of the whole court, hearing of the counsell of both parties, it was resolved that the said exemplification ought not to be given in evidence to the jury for these causes: first, because that which was exemplified, was not of record; for neither deed, charter, or other writing, either sealed, or without seal, ought to be exemplified under the great seale, or any other seal in court of record, for seals of courts of record ought not to exemplifie any thing but that which is of record, because records be publique, whereunto every subject may have recourse to confer the exemplification with the record itself, and records be in the custody of sworn officers, and therefore no inconvenience can follow upon the exemplification of them. But a deed, charter, and other writings are private, and remain in the custody of the party, and may be rased, interlined, or corrupted in points materiall, and if they should be exemplified, the rasure, interlineation, and corruption shall not appear therein. Also the deed, charter, or other writing may be forged, and if they should be exemplified, then the exemplification might ever be shewed in evidence, and not the deed, &c. it self, and so the forgery, and falsity should never upon the view of the deed, or of the seal, or other things rising upon the view, be discovered. Moreover if a forged deed should be exemplified, then the effect of this statute concerning publication should be taken away; for then the forged deed, &c. it self might never be published, or given in evidence, but the exemplification, and so this statute in that point deduced: and therefore where this statute, or any other statute or book speaks of an exemplification, *vidimus* or *innotescimus* of a deed, &c. it must be intended of a deed inrolled, viz. the exemplification, *vidimus*, or *innotescimus* of the inrolment thereof, which is of record. It was further resolved that no record, or inrolment of any record, may be exemplified under the great seale, but of a record of the court of chancery, or other record duly removed thither by *certiorari*, &c. Furthermore it was resolved, that no exemplification ought to be of any part of a letters patents, or of any other record, or of the inrolment thereof, but the whole record or the inrolment thereof ought to be exemplified, so that the whole truth may appeare, and not of such part, as makes for the one party and nothing that make against him, or that manifesteth the truth. Lastly, in the case at the barre, the said book was intituled, *Volumen de copiis munimentorum, et diversorum gestorum.* So as seeing the bull it selfe (being no matter of record) could not be exemplified; *a fortiori*, no exemplification could be had of the copie of the same. And if bulls, &c. might be exemplified, then there might be an evasion to make the statute of 28 H. 8. cap. 16. of small force, which prohibiteth pleading, or alledging of bulls, &c. under paine of a premunire, as by that act appeareth.

C A P.

Mich. 29 & 30
Eliz. lib. 5. fo.
54. in Pages
case.

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28 H. 8. cap.
16. 1 & 2 Ph.
& Mar. cap. 8.
1 Eliz. cap. 1.

C A P. LXXVI.

Of Libels and Libellers.

Mich. 10 E. 3.
coram rege.
Rot. 92. Ebo-
rum.

Mic. 18 E. 3.
coram rege
Rot. 151.
Libellum.

WHAT a libell is, how many kindes of libels there be, who are to be punished for the same, and in what manner, you may read in my reports, viz. Lib. 5. fo. 124, 125. Lib. 9. fo. 59. To these you may add two notable records. By the one it appeareth, that Adam de Ravensworth was indicted in the kings bench for the making of a libel in writing, in the French tongue, against Richard of Snowshall, calling him therein, *Roy de Raveners*, &c. Whereupon he being arraigned, pleaded thereunto not guilty, and was found guilty, as by the record appeareth. So as a libeller, or a publisher of a libell committeth a publick offence, and may be indicted therefore at the common law.

John de Northampton an attorney of the kings bench, wrote a letter to John Ferrers one of the kings counsell, that neither Sir William Scot chiefe justice, nor his fellowes the kings justices, nor their clerks, any great thing would do by the commandement of our lord the king, nor of queen Philip, in that place, more then of any other of the realme; which said John being called, confessed the said letter by him to be written with his own proper hand. *Judicium Curie. Et quia prædictus Johannes cognovit dictam literam per se scriptam Roberto de Ferrers, qui est de concilio regis, quæ litera continet in se nullam veritatem: prætextu cujus dominus rex erga curiam et justiciarios suos hic in casu habere posset indignationem, quod esset in scandalum justic' et curie. Ideo dictus Johannes committitur maresc' et postea invenit 6 manucaptos pro bono gestu.*

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C A P. LXXVII.

Of Champerty, Imbracery, Maintenance, &c.

SE E the first part of the Instit. sect. 701. verb. Maintenance. And the second part of the Institutes, W. 1. cap. 8. 32. & W. 2. cap. 49. and the exposition upon the same. See also the statute of 32 H. 8. cap. 9. in the first part of the Institutes, *ubi supra*. Rot. Parl. 17 R. 2. nu. 10. John de Winsors case. And the fourth part of the Institutes, cap. Chancery. Whereunto you may adde, that where by the statute of 6 H. 6. cap. 2. it is recited, that divers in times past have been disherited, because that in speciall assises the tenant and defendant might not have knowledge nor copie of the pannel of them that be impannelled to passe in the said assises, to inform them of their right and title before the day of the session that the assises shall be demanded; which is a rehearfall of the com-
mon

mon law, but so to be understood, that both parties plaintiffe and tenant, &c. be present, when such information is given, and consenting thereunto: otherwise, if one of them informeth in the absence of another, it is unlawfull, and a good cause of challenge of such of the jury as shall be so on the one part informed: for every jury must be indifferent, as he stand unsworne.

C A P. LXXVIII.

Of Barretry.

SEE the first part of the Institutes, sect. 701. verb. Barretors. See the statute of Ragman, temps E. 1. whereby the commission of Trailebaston is raised. It is thus provided. *Et pur ceo q. en tiels maners de quereles doit le court le roy eē favorable, voet le roy, et enjoint les justices q. nul enquerelant, ne respoignant ne soit surprise nencheson per hocketours, ou barrettours, pou. que le veritie ne soit ensue.*

Vet. Mag. Cart.
cap. 28. 2 part.

Hockettors or *hocquetours* is an ancient French word for a knight of the post, (worthy to be knit to a post) a decayed man, a basket-carrier.

For barrettors, see the first part of the Institutes, *ubi supra*.

C A P. LXXIX.

[176]

Of Riots, Routs, Unlawful Assemblies, Forces, &c.

RIO TUM commeth of the French word, *rioter*, i. *rixari*: and in the common law signifieth, when three or more doe any unlawfull act, as to beat any man, or to hunt in his park, chase, or warren, or to enter or take possession of another mans land, or to cut or destroy his corne, grasse, or other profit, &c.

* *Routa* is derived of the French word *rout*, and properly in law signifieth, when three or more do any unlawfull act for their own, or the common quarrell, &c. As when commoners break down hedges or pales, or cast down ditches, or inhabitants for a way claimed by them, or the like.

An unlawfull assembly is when three or more assemble themselves together to commit a riot or rout, and doe it not. *Prædones autem nominamus usq; numerum septem virorum; deinde (quousq; numerus 35 coaluerit) * turmam (Saxonice hloth) dicimus; numerus si excreverit, exercitum vocamus, hlothbota*, to be quit of unlawfull assemblies.

One may commit a force. But of this, that I may not unprofitably repeat, you may reade at large Fitzherbert, and those others that have written of this argument.

Interest

* Latine Turba.
—comes est discordia vulgi;
Namq; a turbando nomen sibi turba recepit.
I. amb. int. Leg.
In ca. 13, 14, 15. Vide Alve-red. cap. 26.
* Turma quæ tordena.

Interest regi habere subditos pacatos. Vis legibus est inimica. See Lib. 5. fo. 91. 115. Lib. 11. fo. 82. See the first part of the Institutes, sect. 431. 440. Custum. de Norm. cap. 52. fo. 66, 67.

C A P. LXXX.

Of Quarrelling, Chiding, or Brawling by Words in Church or Church-yard.

5 E. 6. cap. 4.

TH E offender being a lay-man, is to be suspended by the ordinary *ab ingressu ecclesiæ*, and being a clerk from the ministration of his office, so long as the ordinary thinks meet according to the fault.

C A P. LXXXI.

[177]

Of Smiting, or laying violent Hands upon another in Church or Churchyard.

5 E. 6. ubi supra.
V. lib. 6. fo. 29.
b. Grenes case,
fin.

TH E offender shall be deemed *ipso facto* excommunicat, and excluded from the company of Christs congregation.

C A P. LXXXII.

Of malicious striking with any Weapon, or drawing of any Weapon in Church or Church-yard, to the intent to strike another, &c.

5 E. 6. ubi supra.
* Note the dis-
junctive.
Int. leg. Inæ.
ca. 6. Qui in
templo pugna-
verit 120 solidis
noxiam facito.
Dier 23 Eliz.
177. case ultim.

TH E offender being convict by the oath of twelve men, or by his own confession, * or by two lawfull witnesses, before justices of assize, justices of oier and terminer, or justices of peace in their sessions, shall lose one of his eares: and if he hath no eares, to be marked in the cheek with a hot iron with the letter F, and *ipso facto* be excommunicate.

C A P. LXXXIII.

For striking, &c. in any of the Kings Courts of Justice: and for striking, &c. in any of the Kings Houses, &c.

SEE before in the sixty fifth chapter of Misprision, that is, *crimen commissionis*.

C A P. LXXXIV.

[178]

Against Fugitives, or such as depart out of the Realme without License, and such as are beyond Sea, and returne not upon Command.

*Omne solum forti patria est, ut piscibus æquor,
Et volucris, vacuo quicquid in orbe patet.*

Ovidius.

IT is first to be seen of acts in parliament published in print, which of them are abrogated and repealed, and which of them stand in force. The statute of 5 R. 2. cap. 2. is repealed by the statute of 4 Jac. cap. 1. And the statutes of 13 Eliz. cap. 3. & 14 Eliz. cap. 6. are expired. The statute of 12 R. 2. such as passe the sea, or send out of the realme to provide or purchase any benefice of holy church, with cure or without cure, are in danger of a premunire. No person resiant within any of the kings dominions, shall depart out of any of those dominions, to any visitation, congregation, or assembly for religion.

12 R. 2. ca. 15.

25 H. 8. cap. 19.
1 Eliz. c. 1.
revive.

Anno 1 Jac. cap. 4. and 3 Jac. cap. 5. Against going or sending of children to any seminary beyond sea, and against the departure out of the realme (without license) of any children not being souldiers, mariners, merchants, or other apprentices, or factors, for any cause whatsoever. And anno 3 Ja. ca. 4. against imposing felony upon any subject that shall depart this realme, to serve any prince, state, or potentate: or shall passe over the seas, and there shall voluntarily serve any such foraine prince, state, or potentate; not having before his or their going or passing, taken the oath mentioned in that act. And likewise imposing felony upon any gentleman or person of higher degree, or any person which hath borne or shall beare any office, or place of captaine, lieutenant, or any other place, charge, or office in campe, army, or company of souldiers, or conductor of souldiers, that shall goe, or passe voluntarily out of this realme, to serve any such foraine prince, state, or potentate,

1 Jac. cap. 4.
3 Jac. cap. 5.

or

or shall voluntarily serve any such foraine prince, state, or potentate, before he be bound by obligation with two sureties, as in that act is prescribed. But it is provided that upon the attainder of any such felony, no forfeiture of dower or corruption of blood shall ensue. Reade over these statutes, for they are so plainly penned, as they need no exposition.

Next unto this, two things fall into consideration, first, what acts of parliament not published in print in our books of statutes do prohibit men to passe the seas without license. And secondly, what may be done therein by the common law of England.

At the parliament holden at Clarendon, anno 10 H. 2. called the assise of Clarendon, *Facta est recognitio cujusdam partis consuetudinum et libertatum antecessorum regis, et ca. 4. sic recognitum est. Archiepiscopis, episcopis, et personis regni non licet exire regnum absque licentia domini regis, et si exierint, si regi placuerit, securum eum facient, quod nec in eundo nec in redeundo, nec moram faciendo perquirent malum seu damnum domino regi vel regno.*

Regist. fo. 89,
90. F. N. B. 85.

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Vide simile Regist. 61, &c. Ad jura regia. Regist. fo. 193. De licentia transfretandi pro religiosis.

This appeareth in it selfe to be but a recognition, or declaration of the common law: and this is manifestly proved by the writ in the Register at the common law, pursuing in effect the very words of the said act of 10 H. 2. *Breve de securitate invenienda, quod se non divertat ad partes externas sine licentia regis.*

And hereupon there ariseth a diversity between one of the clergie, and one of the laity: for a man of the church may be compelled to put in surety, that he should not depart the realme without the kings license, nor shall there attempt any thing in contempt or prejudice of the king or of his people. And this writ is directed to the sheriffe, and saith, *Quia datum est nobis intelligi, quod A. B. clericus versus partes externas ad quam plura nobis et quam pluribus de populo nostro præjudicialia et damna ibid. prosequend., &c.* Whereby it appeareth, that this writ lyeth only in the case of an ecclesiasticall person, or a man of the church, and that for three reasons. First, for that they had the cure of soules, and therefore ought to be resident. Secondly, for that they, maintaining foraine authority, impugned many of the kings lawes, to the great prejudice of the laity. Thirdly, they had no temporall lands, therefore they found sureties.

^a Regist. 89. 90. F. N. B. fo. 85.

^b So as neither this writ, nor a proclamation in nature of this writ ought to be granted, but where the party intends to depart the realme for these ends.

^c F. N. B. fo. 85.

^b Vide Dier
¹ Eliz. 165. b.

^d Rot. Finium
6 H. 3.
Et Rot. claus.
7 H. 3. m. 5.

There is another writ in the ^a Register, and that is to be directed to the party himselfe, viz. either to the clerk, or to the layman, wherein the king reciting, *Quod datum est nobis intelligi, quod tu vers. partes externas absque licentia nostra clandestine te divertere, et* ^b *quamplurima nobis et coronæ nostræ præjudicialia ibid. prosequi intendas, &c. sub periculo quod incumbit prohibemus, ne vers. partes externas absque licentia nostra speciali aliququaliter te divertas, nec quicquam ibid. prosequi, &c.* And upon this writ the party is not to finde any surety, for there is no word of surety in this writ. And if the ^c subject cannot be found, the king may make a proclamation under the great seale, to the effect of the writ last mentioned.

Now let us peruse such authorities as we finde in records or books of law *in serie temporis*, taking some few examples for many that might be cited.

^d *Willielmus Marmion clericus profectus est ad regem Franciæ sine licentia domini regis, et propterea finem fecit, &c.* Note the going over without any prohibition precedent unlawfull.

Nul

* *Nul grand seignior ou chivalier de nostra realm ne doit prender chemin (daler hors de realm) sans nostre conge, car issint purroit le realm remain disgargne de fort gents.* And the ^f nobles and peers of the realm are of the kings great counsel.

By this it appeareth, that these are prohibited to goe beyond sea without licence: but others of the inferiour laity may go without license, if they travell not to the abovesaid prohibited ends. But ^g those of the laity and men of the church also being beyond sea, may be commanded by the kings writ, either under the great seale, or privie seale, *in fide et ligeantia*, &c. to returne into the kingdome (though he be not there to any of the abovesaid prohibited ends;) and if he returne not, for his contempt his lands and goods shall be seised, *quousque*, &c. ^h Commandement was given to an ecclesiasticall person residing at Rome to returne into England.

ⁱ *Quamplurimæ literæ domini regis missæ Romæ, ad revocand' diversos clericos ibid. commorantes, qui quamplurima attemptarunt in dedecus regni, præcipient' etiam, quod redeant ad festum eis appunctuatum: et pro eo quod non venerunt, præceptum fuit vicecomiti quod eos capiat. Et Rogerus de Holme præbendarius in ecclesia Sancti Pauli London captus per vic' London, et ar natus, examinatus, et convictus mittitur prisonæ turris London ibid. moraturus, &c.*

^k *Rex proclamari fecit in omnibus comitatibus Angliæ, quod ne quis comes, baro, miles, religiosus, sagittarius, aut operarius, &c. extra regnum se transferat, sub pœna ar stationis, et incarcerationis.*

Herein it is to be observed, that seeing by law, no earle, baron, or knight (as Britton saith) nor religious, &c. ought to goe out of the realme, a generall proclamation declarative will serve to aggravate their offence: but otherwise it is of those, that are not prohibited by law, they must have such a particular writ or proclamation as is abovesaid.

^l Sir Matthew Gourny knight was prohibited by the kings writ to depart the realm, and to serve in wars expressly inhibited by the king: which notwithstanding he did. Now the record saith, *Quia Mathæus Gourny miles contra defensionem regis transfretavit, et se gueris sibi per regem inhibitis immiscuit, tam in corpore, quam in bonis forisfecit regi manerium de Corimallet simul cum una carucat' terræ, &c.*

^m *Rex ꝑ licentiam dedit abbati de E. quod proficisci possit ultra mare ad visitandum caput Sancti Johannis Baptistæ Ambiani, corpora trium regum Coloniae, feretrum Sancti Francisci in et Sanctum Jacobum in Galicia, ita quod non prosequetur, aut procurabit quicquam in præjudicium regis, aut * legum suarum, sicut idem abbas in præsentia cancellarii regis per juramentum promissit.*

Note that ecclesiasticall persons could not goe beyond sea on pilgrimage without licence, nor to doe any thing in prejudice of the king, or his laws.

ⁿ And it is to be observed that the king may grant licence to travail beyond the seas, either under the great seal, privy seal, or privy signet, but he cannot recall one that is beyond sea, but by the great seale, or privy seal.

But for avoiding of tediousnesse, and heaping many to one end, let us descend to later times.

^o The letters under the great seal, or privy seal to recall any from beyond sea, ought to be served by some ^a messenger, who upon his oath is to make a certificate thereof in the chancery, and from

III. INST.

P

thence

^c Britton temps E. 1. fo. 282, 283. Vide lestatut. de 5 R. 2. ca. 2. Seigniors except out of that statute.

^f See the first part of the Institut. sect. 164.

^g f. 110. a. 27

August 5 H. 4.

De son grand council.

^h An. 19 E. 2. in Scac.

2 & 3 Ph. &

Mar. Dier, 128.

pl. 61. Will. de

Britaine countee

de Richmonds

case.

ⁱ Rot. clauf.

4 E. 3. m. 38.

^j H. 1. 24 E. 3.

coram rege,

Rot. 13.

^k Dorf. clauf.

25 E. 3. m. 18.

^l Mic. 39 E. 3.

coram rege.

Rot. 97. Somers.

Rot. Vasc.

10 E. 3. m. 29.

^m By seisure and

imprisonment.

ⁿ Rot. pat.

40 E. pt. 1. nu.

40. Mich. 41 E. 3.

Coram rege

Rot. 34. Prio-

rissa Sancti

Barth. et de

novo castro quod

mare non tran-

sibit, &c.

+ [180]

^o Nota (legum

suarum) ut

supra.

^b F. N. B. 85. f.

^c Dier Hil.

2 Eliz. 476. the

case of Barteu

and the dutches

of Suffolk.

^d See 10 H. 4. 5.

Englefields case.

Lib. 7. fo. 11.

See the 1. part of

the Institutes

sect. 102.

thence a *mittimus* to be sent into the exchequer, and thereupon a commission to be granted to seise the lands and goods of the delinquent.

* Mich. 12 &
13 El. Dier, fo.
296. & Pasc. 23
Eliz. fo. 375.

* Mich. 12 & 13 Eliz. It was resolved by all the justices (except two) that a merchant of London departing the realm, to the intent to live freely from the penalty of the law, and out of his due obedience to the queen, and not for any merchandise, that it was no contempt to the queen, for merchants were excepted out of the said statute of 5 R. 2. cap. 2. and by the common law merchants might passe the sea without licence, though it were not to merchandise.

It is holden, and so it hath been resolved, that divided kingdomes under severall kings in league one with another are sanctuaries for servants or subjects flying for safety from one kingdome to another, and upon demand made by them, are not by the laws and liberties of kingdomes to be delivered: and this (some hold) is groundd upon the law in Deuteronomy. *Non trades servum domino suo, qui ad te confugerit.*

Deut. c. 23.
v. 15.

When queen Elizabeths ambassadour lieger in France, anno 34 of her reign, demanded of the French king Morgan and others of her subjects, that had committed treason against her; the answer of the French king to the queens ambassadour is truly related in these words. *Si quid in Gallia machinarentur, regem ex jure in illos animadversurum; sin in Anglia quid machinati fuerint, regem non posse de eisdem cognoscere, et ex jure agere. Omnia regna profugis esse libera, regum interesse, ut sui quisque regni libertates tueatur. Immo Elizabetham non ita pridem in suum regnum Mountgomerium, principem Condæum, et alios è gente Gallica admisisse, &c.* and so it rested.

Camden Elizab.
p. 355.

King H. 8. in the 28 year of his reign being in league with the French king, and in enmity with the pope, who was in league with the French king, sent Cardinall Pool ambassadour to the French king, of whom king H. 8. demanded the said Cardinall being his subject and attainted of treason, and to that end caused a treatise to be made (which I have seen) that so it ought to be done *jure gentium: sed non prævaluit.* But Ferdinando king of Spain upon request made by H. 7. to have Edmond de la Pool earl of Suffolk attainted of high treason by parliament, anno 19 H. 7. at the first intending to observe the privilege and liberty of kings, to protect such as came to him for succour, and protection, delivered him not, yet in the end upon the earnest request of H. 7. and promise that he would not put him to death, caused the said earl to be delivered unto him, who kept him in prison, and construing his promise to be personall to himself, commanded his son Henry after his decease to execute him, who in the fifth year of his reign upon cold blood performed the same.

An. 21 H. 7.
Rot. parl. 19
H. 7.

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We could add more examples of this kind, but (to speak once for all) having purposed to give some taste of every thing pertinent, or incident to such things, as we have undertaken to treat of, these shall suffice.

3 Car. ca. 2.
* Mich. 10 H. 4.
Coram rege,
Rot. 59. Hert-
ford.

See the statute of 3 Car. an act to restrain the passing and sending of any to be popishly bred beyond the seas.

* *Flemenesfreme, sive flemenesfrenthe, interpretatur, catalla fugitivorum.*

C A P. LXXXV.

Against Monopolists, Propounders, and Projectors.

IT appeareth * by the preamble of this act (as a judgement in parliament) that all grants of monopolies are against the ancient and fundamentall laws of this kingdome, and therefore it is necessary to define what a monopoly is.

^b A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome, or liberty that they had before, or hindred in their lawfull trade.

^c For the word monopoly, *dicitur, ἀπὸ τοῦ μόνου, ἰ. solo, καὶ πω-
λαίνει, ἰ. vendere, quod est, cum unus solus aliquod genus mercaturæ
universum vendit, ut solus vendat, pretium ad suum libitum statuens:* hereof you may read more at large in that case. And the law of the realm in this point is grounded upon the law of God, which saith, *Non accipies loco pignoris inferiorem et superiorem molam, quia animam suam apposuit tibi.* Thou shalt not take the nether or upper millstone to pledge, for he taketh a mans life to pledge: whereby it appeareth that a mans trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a mans trade, taketh away his life, and therefore is so much the more odious, because he is *vir sanguinis*. Against these inventers and propounders of evill things, the Holy Ghost hath spoken, *inventores malorum, &c. digni sunt morte.*

That monopolies are against the ancient and fundamentall laws of the realm (as it is declared by this act) and that the monopolist was in times past, and is much more now punishable, for obtaining and procuring of them, we will demonstrate it by reason, and prove it by authority.

Whatsoever offence is contrary to the ancient and fundamentall laws of the realm, is punishable by law: but the use of a monopoly is contrary to the ancient and fundamentall laws of the realme, therefore the use of a monopoly is punishable by law.

That offence which is contrary to the ancient and fundamentall laws is *malum in se*. The minor is proved by this declaration in parliament.

The liberty that the subject hath to goe to any clerk in the kings court cannot be restrained but by parliament.

In 50 E. 3. John Peachie of London was severely punished for procuring a licence under the great seal, that he only might sell sweet wines in London,

See in the preambles of 9 E. 3. cap. 1. 25 E. 3. cap. 2. 27 E. 3. & 28 E. 3. Stat. Stap. 2 R. 2. ca. 1. See the statute of Magna Cart. ca. 3. 31 E. 3. cap. 10. 7 H. 4. cap. 9. and 12 H. 7. ca. 6.

^a The statute of 21 Jac. ca. 3. Rom. 1. 30. Inventores malorum.

^b A monopoly described. See the exposition upon Magna Carta, c. 29. & 30. in the second pt. of the Instit.

^c Trin. 44 Eliz. lib. 11. f. 84, 85. le case de Monopolies.

Deut. ca. 24. v. 6.

Rom. 1. 30.

Commercium jure gentium commune esse debet, et non in monopolium, et privatum pauculorum questum convertendum. Iniquum est alios permittere, alios inbibere mercaturam.

11 H. 7. 11.

W. 1. cap. 27.

Rot. par. 50 E. 3. nu. 33.

Rot. Parl.
28 H. 6. nu. 30.

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Mich. 2 & 3 El.
Dier manuscript
not printed.

Stat. de 5 Eliz.

1 & 2 Ph. & Mar. ca. 14. Rot. Parl. 1 R. 2. nu. 20. 4 R. 2. nu. 39. 5 R. 2. nu. 89. Fortescue, cap. 35, 36. One of the articles wherewith William de la Pool duke of Suffolk was charged, was for procuring of divers liberties in derogation of the common law, and hindrance of justice: note this is an offence punishable.

King Philip and queen Mary by their letters patents granted to the maior, bailifs and burgeses of Southampton and their successors, (for that king Philip first landed there) that no wines called malmesies, brought into this realm from the parts beyond the seas by any liege man or alien, should be discharged or landed in any other place of the realm, but only at the said town and port of Southampton, with a prohibition, that no person or persons shall doe otherwise, upon paine to pay treble custome: and it was resolved by all the judges of England that this grant made in restraint of the landing of the same wines was against the laws and statutes of this realme, viz. Magna Carta, 29, 30. 9 E. 3. cap. 1. 14 E. 3. 25 E. 3. ca. 2. 27 & 28 E. 3. statute of the staple. 2 R. 2. cap. 1. and others: and also that the assessment of treble custome was against law, and meerly void. And after at the parliament holden in *anno* 5 Eliz. the patent, as to aliens, was by a private act confirmed by parliament, and not for English.

Trin. 41 Eliz. coram rege, rot. 92. int. Davenant and Hurdys in trespasse. Trin. 44 Eliz. in Lib. 11. fo. 84, 85, &c. Edward Darcies case. Hil. 7 Jacobi in Lib. 8. fo. 121, 122. &c. the case of the City of London.

The judgement in the said case of monopolies cited before, Trin. 44 Eliz. was the principall motive of the publishing of the kings book mentioned in the preamble of this act, and that book was a great motive of obtaining the royall assent to this act of parliament, whereof we are now to speak. This act moved from the house of commons: the act is long and in print, and need not here to be rehearsed: yet will we peruse and explain the words in the severall branches of the act.

By his grant, commission, or otherwise.] These words [or otherwise] are of a large extent, and are well warranted by this act, the words whereof extend not only to all proclamations, inhibitions, restraints, and warrants of assistance of the king, but all inhibitions, restraints and warrants of assistance of all or any of the privy counsell or any other: and all other matters or things whatsoever either of the king, or of all or any of his privy counsell to the instituting, erecting, strengthening, furthering, or countenancing of the sole buying, selling, &c. or any of them, are declared to be altogether contrary to the laws of this realm, &c. *ut in statuto.* This act herein, and in the residue thereof, is forcibly and vehemently penned for the suppression of all monopolies: for monopolies in times past were ever without law, but never without friends.

Sole.] This word [sole] is to be applied to five severall things, viz. buying, selling, making, working, and using; four of which are speciall, and the last, viz. (sole using) is so generall, as no monopoly can be raised, but shall be within the reach of this statute, and yet for more surety these words [or of any other monopolies] are

are added : and by reason of these words [sole using] divers provisions are made by this act, as hereafter shall appear.

Of any thing.] As the words before were generall, so these words [of any thing] are of a large extent. *Res enim generalem habet significationem, quia tam corporea, quam incorporea, cujuscunque sunt generis, naturæ, sive speciei, comprehendit :* and this word caueth some exceptions hereafter to be made, whereof we shall speak in their proper place.

Whereby any person or persons, &c.] For this see the statute of Magna Carta, *ubi supra* : and this clause is impliedly warranted by these words [or of any other monopolies] in the first clause of the purvien.

Shall be for ever hereafter examined, heard, tried, and determined by and according to the common laws of this realm, and not otherwise.] This act having declared all monopolies, &c. to be void by the common law, hath provided by this clause, that they shall be examined, heard, tried, and determined in the courts of the common law according to the common law, and not at the councill table, star-chamber, chancery, exchequer chamber, or any other court of like nature, but only according to the common laws of this realm, with words negative, and not otherwise : for such boldnesse the monopolists took, that often at the councill table, star-chamber, chancery, and exchequer chamber, petitions, informations, and bills were preferred in the star-chamber, &c. pretending a contempt for not obeying the commandements and clauses of the said grants of monopolies, and of the proclamations, &c. concerning the same : for the preventing of which mischief this branch was added.

That all person and persons, bodies politique, and corporate whatsoever, which now are, or hereafter shall be, shall stand, and be disabled, and incapable, &c.] This branch for further extirpation of all monopolies, disableth all men, &c. to have, that is, to take any monopoly, or to use, exercise, or put in ure any monopoly, &c. whereby the wish and desire of the poet is granted.

*Funditus extirpa monopolas et nomopolas ;
Hic labor, hoc opus est ; Hercule major eris.
Paucorum notuit scelerata licentia multis,
Argento mutat dum monopola piper.*

If any person or persons after the end of forty dayes next after the end of this present session of parliament shal be hindred, grieved, disturbed, or disquieted, &c.]

By this branch six things are provided and enacted. 1. Remedy is given to the party grieved at the common law by action or actions to be grounded upon this statute. 2. This remedy may be had in the court of the kings bench, common pleas, and exchequer, or any of them, at the election of the party grieved. 3. The party grieved shall recover treble damages, and double costs. 4. No effoin, protection, wager of law, aid prayer, priviledge, injunction, or order of restraint to be allowed in any such action. By (aid prayer) is intended as well the writ *de domino rege inconsulto*, as the usuall form of aid prayer, for both are to one end, and (order of restraint) was added, for the councill table, star-chamber, chancery, exchequer chamber, and the like.

5. If any person or persons shall after notice given, &c. cause

or procure any such action to be stayed or delayed before judgement, by colour or means of any order, warrant, power or authority, save onely of the court wherein such action shall be brought and depending, the person or persons so offending shall incur the danger of premunire, &c.

This clause extends to the privy councell, star-chamber, chancery, exchequer chamber, and the like, and likewise to those that shall procure any warrant, &c. from the king, &c. and so it was resolved by a committee of both houses before this bill passed; but it extendeth not to the judges of the court before whom any such action shall be brought, for before judgements, days must be given by orders of court, &c.

6 Or after judgement had upon such action shall cause or procure execution of or upon any such judgement, to be stayed by colour or means of any order, warrant, power or authority, save only by writ of error and attainr, the person or persons so offending shall incur the danger of premunire, &c.

This clause is more generall then the former, being the fifth clause, for this extendeth also to the judges of the court where the action is brought or depending, if any stay or delay be used by them after judgement, and so it was resolved as is aforesaid.

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Concerning new
manufactures
and heretofore
granted, &c.

Pasch. 15 Eliz.
in the exchequer
chamber Bircots
case.

Rot. parl. 21 E.
4. nu. 29.
22 E. 4. ca. 5.
7 E. 6. ca. 6.
1 Jacobi, ca. 5.

There be in this act concerning monopolies or sole buying, &c. many provisoes. The first is, that this act shall not extend to any letters patents or grants of priviledge heretofore made of the sole working or making of any manner of new manufacture; but that new manufacture must have seven properties. First, it must be for twenty one years or under. Secondly, it must be granted to the first and true inventer. Thirdly, it must be of such manufactures, which any other at the making of such letters patents did not use: for albeit it were newly invented, yet if any other did use it at the making of the letters patents, or grant of the priviledge, it is declared and enacted to be void by this act. Fourthly, the priviledge must not be contrary to law: such a priviledge, as is consonant to law, must be substantially and essentially newly invented; but if the substance was in *esse* before, and a new addition thereunto, though that addition make the former more profitable, yet is it not a new manufacture in law: and so was it resolved in the exchequer chamber, Pasch. 15 Eliz. in Bircots case for a priviledge concerning the preparing and melting, &c. of lead ore: for there it was said, that that was to put but a new button to an old coat; and it is much easier to adde then to invent. And there it was also resolved, that if the new manufacture be substantially invented according to law, yet no old manufacture in use before can be prohibited. Fifthly, nor mischievous to the state by raising of prices of commodities at home. In every such new manufacture that deserves a priviledge, there must be *urgens necessitas*, and *evidens utilitas*. Sixthly, nor to the hurt of trade. This is very materiall and evident. Seventhly, nor generally inconvenient. There was a new invention found out heretofore, that bonnets and caps might be thickned in a fulling mill, by which means more might be thickned and fulled in one day then by the labours of fourscore men, who got their livings by it. It was ordained that bonnets and caps should be thickned and fulled by the strength of men, and not in a fulling mill, for it was holden in-

inconvenient to turn so many labouring men to idlenesse. If any of these seven qualities fail, the priviledge is declared and enacted to be void by this act; and yet this act, if they have all these properties, set them in no better case, then they were before this act.

The second proviso concerneth the priviledge of new manufactures hereafter to be granted: and this also must have seven properties, first it must be for the term of fourteen years or under: the other six properties must be such as are aforesaid, and yet this act maketh them no better, then they should have been, if this act had never been made, but only except and exempt them out of the purvien, and penalty of this law.

Concerning new manufactures hereafter to be granted, &c.

The cause wherefore the priviledges of new manufactures either before this act granted, or which after this act should be granted, having these seven properties, were not declared to be good, was, for that the reason wherefore such a priviledge is good in law is, because the inventor bringeth to and for the common wealth a new manufacture by his invention, cost and charges, and therefore it is reason, that he should have a priviledge for his reward (and the encouragement of others in the like) for a convenient time: but it was thought that the times limited by this act were too long for the private, before the common wealth should be partaker thereof, and such as served such priviledged persons by the space of seven years in making or working of the new manufacture (which is the time limited by law of apprenticeship) must be apprentices or servants still during the residue of the priviledge, by means whereof such numbers of men would not apply themselves thereunto, as should be requisite for the common wealth, after the priviledge ended. And this was the true cause wherefore both for the time passed, and for the time to come, they were left of such force, as they were before the making of this act.

The third proviso is, that this act shall not extend or be prejudicial to any grant or priviledge, power or authority heretofore made, granted, allowed, or confirmed by any act of parliament now in force, so long as the same shall so continue in force. This was added for that the city of London and other cities and boroughs, &c. have some priviledges for buying, selling, &c. by acts of parliament. For example, the statute of 1 & 2 Ph. and Mar. giveth a priviledge to cities, boroughs, towns corporate, and market towns, for the sale by retale of certain wares and merchandizes, and some other acts of parliament in like case: all which do prove, that such priviledge could not be granted by letters patents. But specially this clause was added in respect of the generality of these words [sole using.]

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1 & 2 Ph. and Mar. cap. 7.

The fourth proviso. Provided also, and it is hereby further intended, declared, and enacted, that this act, &c. shall not in any wise extend, or be prejudiciall unto the city of London, &c.

By this proviso, not only the grants, charters, and letters patents to any city or towne corporate, &c. but also the customes used within the same, are excepted out of this act: which seemeth to be more than need, because the first clause of the purvien of this act doth extend but to commissions, grants, licences, charters, and letters patents.

The fifth proviso doth except out of the purvien and penalty of this

this statute four things, but leaveth them of the like force and effect, and no other, as this act had never been made. First, the priviledge concerning printing made, or hereafter to be made. Secondly, commissions, grants, and letters patents made or hereafter to be made for or concerning the digging, making, or compounding of salt-petre or gunpowder. Thirdly, or the casting or making of ordnance, or shot for ordnance. Fourthly, grants and letters patents heretofore made, or hereafter to be made of any office or offices heretofore erected, made, or ordained, and now in being, and put in execution, (other then such offices as have been decried by any his majesties proclamations.) So as to the thing by this branch excepted, four things are required. First that it be an office. This extendeth only to lawfull offices for divers causes. 1. It was necessary to except lawfull offices in respect of these words [sole using.] 2. Offices are duties, so called; to put the officer in minde of his duty. 3. That which is voide and against law, is no duty, unlesse it be not to use them. 4. Such as are erected against law, are monopolies and oppressions of the people, and no offices. 5. In acts of parliament lawfull offices are intended, as in like cases hath been often adjudged: therefore unlawfull offices are all taken away by this act, and lawfull offices remain and continue.

Lit. sect. 731.
Pl. com. 246. b.
11 H. 4. 80.
4 E. 4. 31. pl. 2.

Secondly, that it be an office heretofore erected. By this act the erection of all new offices, which were not erected before this act, are wholly taken away.

Thirdly, that it be now in being, and put in execution. Though the office were erected before this act, yet if it were not in being and put in execution the 19 day of February in the 21 year of the reigne of king James (at what time this parliament begun) it is cleerly taken away by this act.

See the proclamation bearing date 10 July, an. 19 Jac. regis, and another proclamation bearing date, 20 Martii an. 19 Ja. regis.

Fourthly, that it be such an office, as hath not been decried (for so is the record of parliament, and not [decreed] as it is in the printed book) by any of his majesties proclamations: for all such offices as be decried, that is, either forbidden, or prohibited by any of his majesties proclamations, or where the party grieved is left to his remedy at the common law by any proclamation, they be also decried; for being contrary to the lawes of this realme, as it is declared and enacted by this act, they are also decried with a witnesse, and can never be granted hereafter.

The fift proviso concerning the making of allom, or allome-wines, needed not, for they belong to the subject in whose ground soever the oare is: and therefore any priviledge thereof cannot be granted, but in the kings owne ground.

The sixth proviso concerns the hostmen of Newcastle, &c. This clause was inserted in respect of these words [sole using].

The rest of the provisos concerne particular persons, and do exempt and except certaine supposed priviledges out of the purvien and penalty of this law, but leaveth them of like force and effect, as they were before the making of it.

But it is to be observed, that all the provisos after the sixth, extend only to the supposed priviledges therein particularly mentioned, already granted, and not to any to be granted hereafter.

C A P. LXXXVI.

Against those that obtaine Power to dispence with penall Lawes, and Forfeitures thereof.

IT appeareth by the preamble of this act, that all grants of the benefit of any penall law, or of power to dispence with the law, or to compound for the forfeiture, are contrary to the ancient fundamental lawes of this realme. The statute of 21 Jac. cap. 3.

It was one of the articles wherefore the Spencers in the reigne of king E. 2. were sentenced, that they procured the king to make many dispensations. *Per leur malveis counsell defeasant ceo q. le roy ad grant p. parliament p. bone advice.* In Exilio Hugonis.

In 50 E. 3 Richard Lions a merchant of London, and the Lo. Latimer, were severally sentenced in parliament for procuring of licenses and dispensations to transport wools, &c. Rot. parliam. 50 E. 3. nu. 17. & 28. See 28 H. 6. nu. 30. before.

It is declared and enacted, that all commissions, grants, licenses, charters, and letters patents, heretofore made or granted, to any person or persons, bodies politick, or corporate, of any power, liberty, or faculty, to dispence with any others, or to give license or toleration to doe, use, or exercise any thing against the tenure or purport of any law or statute, or to give, or make any warrant for any such dispensation, license or toleration to be had, or made, or to agree, or compound with any others for any penaltie or forfeitures limited by any statute, or of any grant or promise of the benefit, profit, or commoditie of any forfeiture, penalty or summe of money, that is or shall be due by any statute before judgement thereupon had, and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same or any of them, are altogether contrary to the lawes of this realme, in no wise to be put in execution. The purvien of the act of 21 Jac. cap. 3. The offence described.

And shall be for ever hereafter examined, heard, tried, and determined, by and according to the common lawes of this realme; and not otherwise, &c.

Provided also, that this act shall not extend to any warrant or privie seale made or directed, or to be made or directed by his majestie, his heirs or successors to the justices of the courts of kings bench, common pleas, barons of the exchequer, &c. and other justices for the time being, having power to heare and determine, &c. to compound, &c.

This

This act moved from the house of commons. Now let us peruse, first, the words of the purvien of this act, and secondly, of this proviso.

Hil. 2 Jac. lib. 7.
fo. 36. b. the case
of penal statutes.

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In and by the purvien five things are declared and enacted to be void, and contrary to the ancient fundamentall lawes of this realme. First, all commissions, licenses, charters, and letters patents of any power, liberty, or faculty, or to give license or toleration to do, use, or exercise any thing against any law or statute. The reason hereof is notably expressed by the resolution of all the judges of England, in the case of penall statutes, whereunto we refer you,

2. *Or to give or make any warrant for any such dispensation, license, or toleration.*] For this branch also, see the said case of penall statutes, *ut supra*.

3. *Or to agree or compound with any others for any penalty or forfeitures limited by any statute.*] By this branch, all commissions to agree or compound with any others for any penalty or forfeiture limited by any statute, are declared to be void, and against the ancient fundamentall lawes of the realme. The great inconvenience hereof appeared in the proceedings of Empson and Dudley, in the reigne of king H. 7. who had the office of masters of the forfeitures: and by colour of their commission and office, did most intolerably and unlawfully oppresse, burden, and depauperate the subjects. Let them which follow their steps be afraid of their fearful end: *Qui eorum vestigia sequuntur, eorum exitus perhorrescant.* The like oppression was used by certain commissioners for compositions to be made for offences committed against penall statutes, in the reigne of queen Mary. This branch hath stricken at the root, and prevented this mischief for ever hereafter.

4. *Or of any grant or promise of the benefit, profit, or commodity of any forfeiture, penalty, or sum of money, that is or shall be due by any statute before judgement thereupon had.*] This branch declareth not only the grant to be void, and against the lawes of this realme, (for the which, see the resolution of all the judges in the said case of penall statutes, *ubi supra*;) but the promise thereof also. And the reason that the judges yeeld there, is notable in these words. For that in our experience it maketh the more violent and undue proceeding against the subject to the scandall of justice, and offence of many. So as the grant or promise of any forfeiture before judgement, is both against law, and inconvenient. And if it be so in case of a forfeiture or penalty; much more in case of life and death, for the forfeiture, &c. of any man to be begged, before he be duly and lawfully attainted. For, as the judges say, there is the more violent and undue proceeding against the subject to the scandall of justice, and the offence of many: and therefore such beggers are offenders worthy of severe punishment.

Micah 7. 2.

Against these hunters for blood the prophet speaketh thus, *Pec-
cavit sanctus de terra, et rectus in hominibus non est, omnes in sanguine
insidiantur, vir fratrem suum ad mortem venatur.* There is not a
godly man upon earth, there is not one righteous amongst men,
they all lye in wait for blood, and every man hunteth his brother to
death.

5. *And all proclamations, inhibitions, restraints, warrants of assist-
ance, and all other matters or things any way tending to the institut-
ing,*

ing, erecting, strengthening, &c.] This is the like clause, and is so to be expounded, as before hath been in the chapter of Monopolies.

Concerning the said proviso, the judges before whom the cause dependeth, and that have power to hear and determine the same, who are presumed to be indifferent between the king and the subject, may by warrant or privie seale, &c. compound, &c. for the king only, after plea pleaded by the defendant.

There is another proviso concerning letters patents, or commissions for licensing of keeping of any tavern, or selling, &c. of wines, &c. or for the making of any compositions for such licenses, so as the benefit of such compositions be reserved, and applied to or for the use of his majestie, his heirs or successors and not for the private use of any other person or persons.

The report of the said case of penall statutes was a principall motive of the kings book, mentioned in the preamble of this act: and that book amongst other just and weighty causes moved the king to give his royall assent to this act of parliament, &c. whereof we have spoken.

C A P. LXXXVII.

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Against Concealours (*turbidum Hominum Genus*)
and all Pretences of Concealements whatsoever.

THAT the kings majestie, his heirs, or successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons, bodies politick, or corporate, &c. Statut. de anno
21 Jac. cap. 2.

The act is long, and need not here be rehearsed. Yet will we peruse and explain the severall branches and parts of the act.

Before the making of this statute, in respect of that ancient prerogative of the crowne, that *nullum tempus occurrit regi*, the titles of the king were not restrained to any limitation of time: for that no statute of limitation that ever was made, did ever limit the title of the king to any mannors, lands, tenements, or hereditaments, to any certaine time. And where many records and other muniments, making good the estate and interest of the subject, either by abuse or negligence of officers by devouring time were not to be found; by means whereof, certain indigne and indigent persons prying into many ancient titles of the crown, and into some of later time concerning the possessions of divers and sundry bishopricks, dean and chapters, and the late monasteries, chauntries, &c. of persons attainted, and the like, have passed surreptitiously in letters patents, oftentimes under obscure and generall words, the mannors, lands, tenements, and hereditaments of long time enjoyed by the subjects of this realm, as well ecclesiasticall as temporall:

now

now to limit the crown to some certaine time, to the end, that all the subjects of this realme, their heirs and successors, may quietly have, hold, and enjoy, all and singular mannors, lands, tenements, and hereditaments, which they, their ancestors, or predecessors, or any other, by, from, or under whom they claime, have of long time enjoyed; this act was made and moved from the house of commons, the body whereof consisteth of three parts. First, that part which above is in part rehearsed, consisteth on three branches.

The first part.

First, That the king, his heirs or successors, shall not at any time hereafter, sue, impeach, question, or implead any person or persons, bodies politick or corporate, for, or in any wise concerning any mannors, &c. *Secondly*, Or for or concerning the revenues, issues, or profits thereof. *Thirdly*, Or make any title, claime, challenge, or demand, &c.

This part is exclusive and negative: and herein six things are to be observed.

1. This clause extendeth to all maner of suits, &c. either in law, or in equity. 2. To all manner of courts whatsoever. 3. It extendeth not only to all manner of suits, but to all impeachments, questionings, impleadings, making of title, claimes, challenges, or demands. 4. Under these words [right, and title] not only bare rights and titles are comprehended, but reall estates also. 5. Not only suits, &c. for or concerning any mannors, &c. but for or concerning the revenues, issues, or profits, &c. and this extendeth to the ancient demesnes of the crowne, which are mentioned to be restrained by an act of 11 H. 4. 6. So as all writs of *scire fac'* or other proces upon any record; all informations of intrusion, or charging any man as baylisfe: all finding of offices, either of intitling the king, or of information, are restrained, not only within these words [impeach or question] but also within these words [or make any title, claime, challenge, or demand] which are large and beneficial words, and all other suits, &c. of what kind or nature soever. But this negative clause must have four incidents. 1. The kings right and title must accrew unto him above threescore years past before the nineteenth day of February, in the 21 year of king James, which was the day of the beginning of this parliament. The reason hereof was, that if any title of escheat, forfeiture, &c. accrewed within threescore years, then it should be out of this act: for generally the time of limitation to bar the king was threescore years, but such right or title must now be *in esse*. 2. Unlesse the king or his progenitors, &c. or any under whom he or they claim, have been answered by force and vertue of any such right or title to the same, the rents, revenues, issues, or profits thereof within threescore years, &c. In this branch these words [by force and vertue of any such right or title] were materially added, for otherwise if the king had been answered the rents, revenues, &c. by reason or pretext of wardship, primer seison, extent, or the like, it might have made a doubt whether such an answering of the revenues, &c. had been within this act; which doubt is cleared, that it must be by force or vertue of any such right or title, whereby the king impeacheth the state of the subject. 3. Or that

Rot. Par. 11 H.
4. nu. 23. not
imprinted.

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that the same have been duly in charge to his majesty, or to the late queen Elizabeth within the space of threescore years. Duly in charge in judgement of law, is the roll of the pipe: for although a note before the auditor or any other may be a mean to bring it in question, and to be put in charge, yet that is not in judgement of law said to be duly in charge, unlesse it be in charge in the pipe.

4. Or have stood in super of record within the said space of threescore years. It cannot stand in super, unlesse the thing in question were before duly in charge.

But there is a good proviso added towards the end of this act, viz. that no putting in charge, or super, or answering of the farm rents, revenues, or profits, &c. in four cases shall be within this act, viz. by force, colour or pretext of any letters patents of concealments: they were called letters patents of concealments, because either they had a clause before the *habendum: quæ quidem maneria nuper fuerunt à nobis concealata, subtracta, vel injuste detenta*, or to the like effect; or else a proviso after the *habendum* to the like effect. Letters patents of concealment were granted in queen Maries time; and the first that I find, were granted to Sir George Howard: and in all succeeding acts of parliament of confirmation of letters patents, letters patents of concealments are excepted.

2. Or defective title. By letters patents passed by the warrant of certain commissioners under the great seal for compositions of defective titles, pretending the same to be for the kings benefit, and safety of the subject, in which letters patents no words of concealment, &c. are mentioned, but yet upon the matter, they were supposed to be concealed, &c. from the crown.

3. Or of lands tenements or hereditaments out of charge. This was a new device to have a certificate, that they were not in charge, and then to take a grant from the king, for a very small composition, &c. And these were but inventions and subtile devices to deceive the king, to rob him of his tenures, and to the infinite vexation and trouble of the subject, all which mischiefs are now remedied by this act.

4. Or by force, colour or pretext of any commission or other authority to find out concealments, defective titles, or land, &c. out of charge. This was a necessary clause to be added, for of this kind there were infinite numbers.

Out of this first part all liberties and franchises be excepted.

And that every person and persons, bodies politique and corporate, their heirs and successors, and all claiming from, by, or under them, or any of them, for and according to their severall estates and interests, which they have, or claim to have in the same respectively, shall hereafter quietly and freely have, hold and enjoy against his majesty, his heirs and successors, &c.

The second part.

This is the second part of the body of the act, and as the first part is negative and exclusive of the right and title of the king, so this part is affirmative, and establishing the estate of the subject.

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The

The mischief before this statute was in two sorts, viz. either when the king had any estate vested, or continued in him; or where the king had but a bare right. For example, the kings tenant seised of lands, &c. in fee is attainted of felony, and dieth, the king hath a real estate in him: but if before the felony the kings tenant were disseised, and after is attainted, and dieth, now hath the king but a bare right. In both these cases, *et sic in similibus*, the subject is provided for by this act, both by the first part, and by this also: for where in this part it is said, according to their and every of their several estates and interests which they have or claim. If they have an estate, and the king but a bare right or title, then are they within these words [which they have] and if the king hath a reall estate in him, then are they within these words [or claim] so as the remedy is applied to both the mischiefs. Again, the words in this part are further, have held, or enjoyed. That is, where the subject hath an estate, and the king but a bare right or title.

Or taken the rents, issues, revenues, or profits thereof.] These words extend to all cases where the reall estate is in the king: hereby is understood the actuall taking of the rents, issues, revenues, or profits by one that claims an interest in the land: for albeit the king may in law charge him as bailif, yet without question, *de facto*, he did take the rents, issues, revenues and profits, and that sufficeth to answer the letter and meaning of this act.

Moreover, the words of this part are, [Against him, his heirs or successors.] So admit in the case put before, the kings tenant being disseised, as is aforesaid, before his attainder of felony, that that disseisor had been disseised, or had morgaged the land before this statute, this act in this case barreth the king of his right and title, and to that end worketh upon the estate of the disseisor or morgagee: but yet the first disseisor or the morgagee for the condition performed or broken may re-enter; for the words of this part be [against the king, his heirs, and successors] so as the bar is only against them: and every subject shall take benefit of this act, for the kings right and title is thereby utterly barred: and there is a saving hereafter in this act to all persons, &c. other then the king, &c. all such right, &c. as they ought to have had before this act.

This part extendeth not to liberties and franchises.

Now followeth the third part of the purview of this act.

The third part.

And furthermore, that every person and persons, bodies politique and corporate, their heirs and successors, &c. shall quietly and freely have, hold, and enjoy all such mannors, &c. as they now have, claim, and enjoy, &c. against all and every person and persons, their heirs and assigns having, claiming, or pretending to have any estate, right, title, interest, claim or demand whatsoever, &c. by reason, or colour of any letters patents, or grants upon suggestion of concealment, or wrongfull detaining, or not being in charge, or defective titles, or by, from, or under any patentees, &c. of or for which mannors, &c. no verdict, &c.

This

This part secures the subject against the subject, viz. against patentees and grantees of concealments, defective titles, or lands not in charge, and all claiming under them. A beneficial law both for the church and common wealth, in respect of the multitude of letters patents and grants of these natures and qualities, and many of them of large extents and in generall words, and had passed through the hands of many indigent and needy persons, &c.

This part extendeth to liberties and franchises, which the former two parts did not.

The two first provisos are plain, and in effect are included in the body of the act. The second proviso was necessary to preserve tenures: the saving needeth no explanation. The third proviso is particular and evident. The fourth proviso, Provided also, and be it enacted, that where any fee farm rent, &c. This was added for the preserving of the kings fee farms and rents out of such manors, &c. which are established and made sure by this act. For example: king E. 6. did grant the manor of D. which came to him by the statute of Chanteries, to I. S. and his heirs, reserving a fee farm, or any other rent, which grant for some imperfection was insufficient in law to passe the said manor, and yet is established and made sure by this act. This proviso maketh good the fee farm or rent to the king, if he hath been answered the same by the greater part of sixty years last past.

The last proviso is particular and evident.

Of the benefit of this act the poor doe participate, as well as the rich, for hereby (amongst other things) above an hundred lay hospitals having had priests within them in those days to pray and sing for souls, &c. (if need were) are established against all vexations, and pretences of concealments.

See an excellent act made against these harpyes or heluones, that under obscure words endeavoured surreptitiously in a patent of concealment to have swallowed up the greatest part of the possessions of that ancient and famous bishoprick of Norwich, which by the industry and prosecution of the then attorney generall was overthrown, and yet for more surety in a matter of so great weight preferred a bill in parliament for establishing of the bishoprick, which in the end passed as a law, anno 39 El. ubi supra.

See 39 El. ca. 22. which is worthy to be read. See this case at large in the fourth part of the Institutes cap. Consistory Courts, &c.

*Tristius haud illis monstrum, nec scævior ulla
Pestis et ira Dei stygiis sese extulit undis:
Virginei volucrum vultus, fœdissima ventris
Proluoies, unæque manus, et pallida semper
Ora fame.*

C A P. LXXXVIII.

Against Vexatious Relators, Informers, and Promooters upon Penall Statutes.

Statutum de
21 Jac. reg. c. 4.

THAT all offences hereafter to be committed against any penall statute, for which any common informer or promooter may lawfully ground any popular action, bill, plaint, suit or information, &c. shall be commenced, sued, prosecuted, &c. before the justices of assise, justices of nisi prius, &c. in the counties where the offences were committed, and not elsewhere,

28 El. ca. 5.

28 El. ca. 5.
31 El. ca. 10.

Whereas a good and profitable law was made in the 18 year of queen El. for the ease and quiet of the subject, and for the regulating of informers upon penall statutes, inflicting corporall punishments in certain cases upon them. And whereas two other good laws were made for the same ends, the one in the 28 year, and the other in the 31 year of the said late queens reign, which yet stand and remain in force: yet these acts did not meet with all the mischiefs and grievances offered to the subject by the relators, informers and promooters, (*turbidum hominum genus*) but these four mischiefs and grievances remained still.

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First, many penall laws obsolete, and in time grown apparently impossible, or inconvenient to be performed, remained as snares, whereupon the relator, informer or promooter did vex and entangle the subject: such as were the statutes made *anno* 37 E. 3. cap. 3. concerning the prices of poultry, and 34 E. 3. ca. 20. concerning transportation of corn, and 3 E. 4. cap. 2. concerning corn not to be brought into the realm, and 4 H. 7. ca. 9. concerning the prices of hats and caps, and 14 R. 2. cap. 7. concerning the passing of tyn out of the realm, and 15 R. 2. cap. 8. concerning the carriage of tyn to Calys, and 4 H. 5. cap. 3. concerning making of pattens of asp, and 4 H. 7. ca. 8. concerning the prices of broadcloath, &c. and 11 H. 7. cap. 2. concerning vagabonds, unlawful games, and alehouses, &c. and one other statute in the 19 year of H. 7. ca. 12. concerning those matters, and 11 H. 6. ca. 12. concerning waxchandlers, and the price of candles, and 34 H. 8. cap. 7. concerning the sale of wines, and 28 H. 8. cap. 14. concerning the prices of wines, and 27 H. 8. stat. *de monasteriis*, concerning keeping of house and households upon scites of monasteries, &c. and 4 H. 7. cap. 19. concerning houses of husbandry and tillage, and 7 H. 8. ca. 1. concerning letting down of towns, and 27 H. 8. cap. 22. concerning decay of houses and inclosures, and 5 E. 6. ca. 5. for the maintenance of tillage, &c. and 5 Eliz. cap. 2. for maintenance and increase of tillage, and 14 R. 2. ca. 4. 8 H. 6. ca. 23. and 5 E. 6. cap. 7. concerning the buying of wooll, wdoollen yarn, &c. and 33 H. 8. cap. 5. concerning the keeping

keeping of great horses, the statute of Winchest. in the time of E. 1. concerning harnesses and arms, Artic. super Cart. ca. 20. concerning making of rings, crosses, and locks, and 37 E. 3. cap. 7. that makers of white vessell should not guild, and 2 H. 5. ca. 4. stat. 2. that goldsmiths should not take more then forty six shillings eight pence for a pound of troy silver guilt, and 2 H. 6. ca. 14. that no silver shall be bought for more then thirty shillings the pound of troy, and 2 H. 4. ca. 6. against the bringing in of coin of Flanders, Scotland, and other forain coin, and 13 R. 2. ca. 8. and 4 H. 4. cap. 25. concerning the prices of hay and oats sold by hostlers, and 4 & 5 Ph. and Mar. ca. 5. concerning the putting to sale of coloured cloth: and another part of the same statute concerning the mystery of making, weaving, or rowing of woollen cloth, &c. and 18 El. ca. 16. for toleration of certain clothiers to dwell out of towns corporate, and many other unnecessary statutes unfit for this time, about the number of threescore are repealed by an act made at this parliament in the 21 year of the reign of king James, as by that act appeareth: and many like acts are not continued, as by the conference between that act and other former acts of continuance may appear: so as these snares that might have lien heavy upon the subject, by this and other former statutes either are repealed, or not continued.

13 E. 1. stat. de Winton.

The second mischief was, that common informers, and many times the kings attorney drew all informations for any offence, in any place within the realm of England against any penall law to some of the kings courts at Westminster, to the intolerable charge, vexation, and trouble of the subject; and it was feared that Westminster hall would labour of an apoplexy by drawing up all suits unto it, as the naturall body doth *tabescere*, when the humours of the body are drawn up unto the head, which in the end (if it be not prevented) turneth to an apoplexy.

The third mischief was, that in informations, &c. the offence supposed to be against the penall law, and to be committed in one county, was at the pleasure of the informer, &c. alledged in any county where he would, where neither party nor witnesse was known, against the right institution of the law, that the jury (for their better notice) should come *de vicineto* of the place where the fact was committed.

The fourth mischief was, that in divers cases the party defendant in informations or actions upon the statute, were driven to plead specially, which was both chargeable and dangerous to him, if his plea were not both substantiall and formall also.

These three mischiefs last mentioned are expressly and absolutely provided for by this act, which moved from the house of commons. And so did the act of continuing and reviving of divers statutes, and repeale of divers others.

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21 Jac. cap. 28.

The first part of the purvien beginning thus. For remedy whereof be it enacted by the authority of this present parliament, that all offences, &c.

The first part of the act.

This clause consisteth upon three parts. First, affirmative: and this is divided into two branches. 1. For the informations, &c. It is enacted, that where a common informer might before this act have informed upon any penall statute before justices of assise, justices of *nisi prius*, or justices of gaole-delivery, justices of oier and terminer,

miner, or justices of peace in their generall or quarter sessions; there a common informer may informe, &c. 2. Before what judges; this act appoints no new judges, but such as former penall lawes appointed, viz. the justices before mentioned, or any of them according to the former act.

The second part is restrictive, restraining any information, &c. to be commenced, sued, &c. either by the attorney generall, or by any officer, common informer, or any other person whatsoever, in any of the kings courts at Westminster. So as the kings bench, star-chamber, chancery, common-pleas, exchequer, or exchequer-chamber, cannot receive or hold plea of any information, &c. upon any penall statute, either by the kings attorney, any common informer, or any other person whatsoever: but the matter shall be heard and determined before such justices as are foresaid in the proper county where the offence was committed.

The third part giveth the like proces upon every popular action, bill, plaint, information, or suit to be commenced or prosecuted by force, of, or according to the purport of this act, as in an action of trespassse, *vi et armis*, at the common law: but upon no other popular action, bill, &c. which is not sued, &c. by force of this act.

The second part
of the act.

The second part of this act doth meet with the second of the said three mischiefs, and standeth upon three branches.

First, that in all informations, exhibited, &c. either for the king or any other, &c. the offence shall be layed and alledged, &c. in the said county where such offence was in truth committed, and not elsewhere.

The second branch is, that if the defendant pleadeth the generall issue, the plaintiffe or informer upon evidence to the jury must prove two things: first, the offence laid in the information, &c. Secondly, that the offence was committed in that county, otherwise the defendant shall be found not guilty.

The third branch is, that for more surety that the offence shall be alledged truly in the proper county where in truth it was committed, no information, &c. shall be received, filed, or entred of record, untill the informer, or relator hath first taken a corporall oath before some of the judges of that court, which consisteth on two parts: first, that the offence or offences laid in such information, &c. were not committed in any other county, then where the same are alledged in the information, &c. Secondly that he believeth in his conscience, that the offence was committed within a year before the information or suit. And this oath is to be entred of record. And all this is to be done before the information be received, filed, or entred of record.

The third part
of the act.

The third part of this act meeteth with the last mischief: for by this part the defendant may plead the generall issue, and give any speciall matter in evidence to the jury: which matter being pleaded, had been a good and sufficient matter in law, to have discharged the defendant, &c.

27 H. 8. f. 21,
&c.

This is a very beneficiall clause, and cleereth many questions at the common law. And where it may be objected, that for want of sufficient clerks, the proceeding according to this statute will be erroneous, and to be reversed by writ of error, so as it will deter informers to informe, &c. and in effect, lay asleep all penall lawes

To

To this it may be answered, First, that it shall be the fault of the informer himselfe; for if he informe before justices of assise or *nisi prius*, they * have sufficient clerks. Secondly, I perswade my selfe, that the other justices will in discharge of their conscience and duty, provide sufficient clerks. And lastly, that few or no errors shall fall out in respect of the generall pleading.

The last clause of this act is this, Provided alwayes that this act or any thing therein contained, shall not extend to any information, &c.

By this clause this act extends not to penall statutes of these sorts: concerning 1. Popish recusants for not comming to church. 2. Maintenance, champerty, or buying of titles. 3. The subsidie of tonnage and poundage, wooll, &c. 4. The defrauding the king of any custome, tonnage, poundage, subsidie, impost, or prisage. 5. Transportation of gold, silver, powder, shot, munition of all sorts, wooll, woollfells, or leather, but that every of these offences may be layed or alledged to be in any county at the pleasure of any informer. But yet the informer cannot informe, &c. for any of these offences in any of the courts at Westminster, but before the justices appointed by this act: for this clause extendeth only for the laying or alledging of any of these offences in any county that he will.

Inter Wideston and Clark maior of Nottingham, the case was this. Wideston being arrested in Nottingham by precept in the nature of a *capias*, he was imprisoned in the custody of the maior being keeper of the gaol within the same towne, and before the returne of the precept Wideston offered to the maior sufficient surety to appeare, &c. and he refused to accept the same: whereupon Wideston brought his action by bill upon the statute of 23 H. 6. cap. 10. whereunto the defendant pleaded the generall issue; and it is found by verdict against the defendant. In arrest of judgement it was shewed, that by the said statute of 18 Eliz. cap. 5. it is provided, that none shall be admitted or received to pursue against any person upon any penall statute, but by way of information or originall action, and not otherwise: in respect of the said negative words it was adjudged, that, for that the said action was brought by bill, and not by information or originall, *quod querens nihil capiat per billam*. See the rest of the statute of 18 Eliz. concerning informers.

Mic. 29. &
30 El. coram
rege.

18 Eliz. cap. 5.
Vi. lib. 6. fo. 19.
b. Gregories
case.

You have heard of four viperous vermin, which endeavoured to have eaten out the sides of the church and common-wealth: three whereof, viz. the monopolist, the dispencer with public and profitable penall lawes for a private, and the concealers are blowne up, and exterminated: and the fourth, viz. the vexatious informer well regulated and restrained, who under the reverend mantle of law and justice instituted for protection of the innocent, and the good of the common-wealth, did vex and depauperize the subject, and commonly the poorer sort, for malice or private ends, and never for love of justice. And these are worthily placed amongst the pleas of the crowne, because it is for the honour and benefit of the crowne, when the church and common-wealth doe flourish in peace and plenty: for the king can never be poore, when his subjects are rich.

Hil. 36 Eliz.
Rot. 135. int.
plac. regis, co-
ram rege. Ha-
monds case.

Trin. 31 Eliz.
coram reg.
Strettons case.

See hereafter,
cap. 105. of
Pardons
37 H. 6. fo. 4.
5 E. 4. 3.
2 R. 3. fo. 12.
1 H. 7. 3.
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George Hamond informed upon a penall statute concerning flipping of cloth in the name of another. *Qui tam*, &c. against Edw. Griffith defendant. Hamond the informer died and upon motion made by the attorney generall, it was the opinion of the whole court, that he the attorney generall might proceed for the queens moiety after the death of the informer.

Between Stretton, *Qui tam*, &c. and Tayler defendant, that after a popular action commenced, although the attorney generall will enter an *ulterius non vult prosequi*; or if the defendant plead a special plea, although the use be, that the attorney (to the end that there may be no jugling or covin between the informer and the defendant) reply only; notwithstanding, if the attorney generall will not reply, the informer may proceed, and prosecute for his part; for the informer by his suit commenced hath made of a popular action his private, which the king cannot for the part of the informer pardon or release. And notwithstanding in all these cases before any action or information commenced by the informer, but the suit remaining popular wherein the king only, and no subject hath any interest, the king may pardon and release the same: for after that pardon, no informer can informe *tam pro domino rege, quam pro seipso*, according to the statute, &c. and for himselfe only in a popular action he cannot informe.

C A P. LXXXIX.

Of Forestalling, Ingrossing, &c.

See the first part
of the Institutes,
sect. 240.

Domesday.

^a Chent. Dover.
ter.

^b Wircester.

Scirropscir

Civitas.

^c Fleta, lib. 1.
ca. 42.

§ Forestall, &
lib. 4. cap. 11.

Britton, fo. 33.

a. 77. a.

^d Vi. Vet. M. C.
part. 2. 24. b.

34 E. 1. de Pis-
tor. Braciatori-
bus et aliis Vic-
tuellariis, et de
Forestellariis,
hic infra.

* 51 H. 3. Rast.
weights and
measures. 4.

25 E. 3. c. 3.

stat. 3. 27 E. 3.

cap. 11. stat. Stap.

28 E. 3. cap. 13.

5 E. 6. cap. 14.

5 Eliz. cap. 12.

13 Eliz. cap. 25.

FORISTEL^a, *faristel*^b, *foristellum*, et *foristellarius*, derived of two Saxon words, viz. *far* or *fare* (*via* or *iter*) *unde fare* for a passage and farewell, to go or proceed well: we have turned *far*, to *for* and *stall*, which we retaine still, and signifieth *interceptionem*, or *impedimentum transitus*, hindrance or interception. And the offender is called *foristellarius*. See of this offender in the ancient statute: ^d *Nullus foristellarius in villa patiatu morari, qui pauperum sit depressor manifeste, et totius communitatis, et patrie publicus inimicus, qui bladum, pisces, allec, vel res quascunque venales per terram, vel per aquam venientes, quandoque per terram, quandoque per aquam obviando præ cæteris festinat, lucrum sitiens vitiosum, pauperes opprimens, ditiores decipiens, qui sic minus juste illo qui eos apportaverit multo magis vendere machinatur. Qui mercatores exterraneos venalibus venientibus circumvenit, offerens se venditioni rerum suarum, et suggerit, quod bona sua carius vendere poterunt, quam vendere proponebant, et sic arte, vel ingenio vellam seducit et patriam. Primo convictus graviter amercietur, secundo subeat iudicium pilloriæ, tertio incarceretur, et redimatur, quarto abjuret villam. Et hoc iudicium fiet de foristallariis universis, et similiter de his qui * consilium aut auxilium eisdem præstiterint vel favorem, &c.* And his description see in a latter act. See before in the chapter of Monopolists.

Ingrossator or *engrossator*, of the English and French word, *grosse*, that is, great or whole, *unde merchant-grossier*, a merchant that sel-

leth

leth by great or whole-sale. We remember not that we have read of this word [ingrosse] in any act of parliament, book-case, or record, but ^e rarely, before the said act of 5 E. 6. And there is an ingrosser by the common lawes, who is hereafter described. And there is an ingrosser by act of parliament, and he is described by the statute of 5 E. 6. And by that act a ^f regrator is also described, who is a kinde of ingrosser. Reqrator is derived of the French word *regratement*, for huckstery. But in ancient time both the ingrossor and regrator were comprehended under forestaller.

It was ^g resolved by the justices and barons of the exchequer upon conference betwixt them, that salt is a victuall, and the buying and selling thereof was within the statute of 5 E. 6. for it was not only of necessity of itselfe for the food and health of man, but it seasoneth and maketh wholesome beefe, pork, &c. butter, cheese, &c. and other viands. And Peryam justice said, ^h Hil. 26 Eliz. in communi banco, that so it had been lately adjudged.

ⁱ Mich. 6 Jac. in scaccario, in an information by Baron against Boy, upon the statute of 5 E. 6. cap. 14. of ingrossers for buying and selling of apples; the defendant pleaded not guilty, and was found guilty. But the barons gave judgement against the informer, and caused an entry to be made in the margent of the record, that the judgement was given upon matter apparent to them, that apples were not within the said act, for that the act is to be intended of victuall necessary for the food of man, the words of the act being [corne, graine, butter, cheese, fish, or other dead victuall] which is as much as to say, (of other dead victuall of like quality: *id est*, of like necessary and common use.) And therefore apples being rather of pleasure then necessity, are not within the said statute no more then plumbs, cherries, or other fruit; and no information hath ever been exhibited for ingrossing of apples, plumbs, cherries, or other fruit: but the statute of 2 E. 6. cap. 15. doth forbid conspiracy of costermongers and fruterers, and maketh such conspiracie unlawfull. And the said judgement of the barons was affirmed in a writ of error in the exchequer chamber.

Venditio brasiei non est venditio victualium, nec debet puniri sicut venditio panis, vini, et cervisie, et hujusmodi, contra formam statuti. But the act of 5 E. 6. hath made corne, graine, &c. to be victuall within that act. *Vide* Vet. N. B. 2. part 23. b. stat. de pistor., braceator., et aliis victelariis. 34 E. 1.

It was upon conference and mature deliberation resolved by all the justices, that any merchant, subject, or stranger, bringing victuals or merchandize into this realme, may sell them in grosse: but that vendee cannot sell them againe in grosse, for then he is an ^{*} ingrosser according to the nature of the word, for that he buy ingrosse, and sell ingrosse, and may be indicted thereof at the common law, as for an offence that is *malum in se*. 2. That no merchant or any other may buy within the realme any victuall or other merchandize in grosse, and sell the same in grosse againe, for then he is an ingrosser, and punishable, *ut supra*: for by this means the prices of victuals and other merchandize shall be inhaunced, to the grievance of the subject; for the more hands they passe through, the dearer they grow, for every one thirsteth after gaine, *vitiosum faciunt lucrum*. And if these things were lawfull, a riche man might ingrosse into his hands all a commodity, and sell the same at what

^e For the word [Ingrossor,] see 27 E. 3. c. 5. stat. 1. 37 E. 3. cap. 5.

^f For this word [Reqrator,] see 51 H. 3. weights and measures.

4. Rastall.

14 R. 2. ca. 4.

8 H. 6. cap. 5.

Reqrators or choppers, and in some countries called jobbers.

^g M. 44 & 45

El. at Serjeants Inne in Fleetstreet.

^h Hil. 26 Eliz.

judgement cited p. Peryam justice.

ⁱ M. 6. Jac. in Scac. Int. Baron and Boy.

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P. 18 E. 2. Coram rege Rot. 76. Southt.

Mich. 39 & 40. El. Resolution de tous les justices.

^{*} Dardanarius. An ingrosser by the common law described.

—Lucrumq; acquirit eundo, Nivis utexiguus crescit eundoq; globus.

3 E. 2. Action
furthestat. F.N.B.
250. I.

43 Aff. p. 38.
tit. Aff. 354.

Nota, the abate-
ment by undue
means of the
price of our na-
tive commodi-
ties, is punish-
able by fine and
ransome.

See 23 E. 3. ca.
6. 13 R. 2. cap.
8. Inter leges
Ethelstani.
cap. 12.

Inter leges Will.
Conquest. fo.
125.

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Hil. 25 E. 3.
coram rege. Rot.
13. Buck. Had-
hams case.
* Of the French
word *Taser*, to
heape in goves
or stacks.

See 5 E. 6. ca.
14. He is an in-
grosser that buyes
(other then by
grant or lease of
land or tithe)
any corne grow-
ing in the fields,
&c.

price he will. And every practise or device by act, conspiracy, words or newes, to inhaunce the price of victuals or other merchandize, was punishable by law; and they relied much upon the statute aforesaid, *nullus forstallarius, &c.* which see before in this chapter: and that the name of an ingrosser in the reigne of H. 3. and E. 1. was not known, but comprehended within this word [*forstallarius*] *lucrum sitiens vitiosum*; and ingrossing is a branch of forestalling. And for that *forstallarius* was *pauperum depressor, et totius communitatis et patrie publicus inimicus*, he was punishable by the common law. They had also in consideration the book in 43 Aff. where it was presented, that a Lombard did procure to promote and inhaunce the price of merchandize, and shewed how: the Lombard demanded judgement of the presentment for two causes. 1. That it did not sound in forestalling. 2. That of his endeavour or attempt by words, no evill was put in ure, (that is) no price was inhaunced, *et non allocatur*, and thereupon he pleaded not guilty: whereby it appeareth, that the attempt by words to inhaunce the price of merchandize was punishable by law, and did sound in forestalment: and it appeareth by the book that the punishment was by fine and ransome. And in that case Knivet reported, that certaine people (and named their names) came to Coteswold in Herefordshire, and said in deceit of the people, that there were such wars beyond the seas, as no wooll could passe or be carried beyond sea, whereby the price of wools was abated: and upon presentment hereof made, they appeared; and upon their confession they were put to fine and ransome. See the statute of 25 H. 8. cap. 2. whereby the lords of the councell, justices, &c. or any seven of them, &c. have power to set prices on victuals, and the same to be proclaimed under the great seale.

For preventing of all ingrossing and forestalling, it was the ancient law before the conquest, *Decrevimus porro, ne quis extra oppidum quicquam 20 denariis carius aestimatum emat, verum intra portum præsente oppidi præfecto, aliove viro fidele, aut ipso denique præposito regio, in celebri plebis concursu, et hominum oculis quisque mercator.*

Interdicimus etiam ut nullæ pecudes emantur nisi infra civitates, et hoc ante tres fideles testes nec alia necessaria sine fideijussore et warranto, &c. Item, nullum mercatum vel feria sit, nec fieri permittatur, nisi in civitatibus regni nostri, et in burgis, &c.

*Commissio facta fuit Roberto Hadham ad vendend' blada et alia bona diversarum abbathiarum alienigenarum, qui venit et cognovit, quod vendidit blada prioris de Tickford in garbis in duabus * tassis existent' pro 10 li. quæ venditio facta fuit contra legem et consuetudinem regni Angliæ, vendend' in garbis, priusquam triturat' fuerunt, quod fieri debuisset per mensuram post eorum triturationem: ideo committitur prisonæ, et adjudicatur, quod ab omni officio domini regis amoveatur, et quod finem faciat cum domino rege.*

Observe well this judgement, that it is against the common law of England to sell corne in sheafes before it is threshed and measured, and the reason thereof seemeth to be, for that by such sale the market in effect is forestalled.

C A P. XC.

AGAINST ROBERDSMEN.

IT is an English proverbe; That many men talk of Robin Hood, that never shot in his bow: and because the statutes and records hereafter mentioned cannot well be understood, unlesse it be known what this Robin Hoode was that hath raised a name to these kinde of men called Roberdsmen, his followers, we will describe him.

This Robert Hood lived in the reigne of king R. 1. in the borders of England and Scotland, in woods and deserts, by robbery, burning of houses, felony, waste and spoile, and principally by and with vagabonds, idle wanderers, night-walkers, and draw-latches: so as this notable thiefe gave not only a name to these kinde of men, but there is a bay, called Robin Hoods Bay, in the river of in Yorkshire. And albeit he lived in Yorkshire, yet men of his quality took their denomination of him, and were called Roberdsmen throughout all England.

Against these men was the statute of Winchester made in 13 E. 1. for preventing of robbery, murders, burning of houses, &c. Also the statute of 5 E. 3. which reciting the statute of Winchester, and that there had been divers manslaughters, felonies, and robberies done in times past, by people that he called roberdsmen, wasters, and drawlatches, and remedy provided by that act for the arresting of them.

At the parliament holden 50 E. 3. it was petitioned to the king that ribauds and sturdy beggers might be banished out of every towne. The answer of the king in parliament was touching ribauds: the statute of Winchester and the declaration of the same with other * statutes of roberdsmen, and for such as make themselves gentlemen, and men of armes, and archers, if they cannot so prove their selves, let them be driven to their occupation or service, or to the place from whence they came.

It is provided by the statute of 7 R. 2. that the statutes made in the time of king Edward, grandfather of the king, of roberdsmen, and drawlatches, be firmly holden and kept, and further provision against vagabonds wandring from place to place. See a law made in the sixth parliament of queen Mary, *anno Dom.* 1555 in Scotland against Robert Hood, Little John, &c.

He was, saith
Maior Scotus,
praedonum prin-
ceps et praedo
mitissimus.

13 E. 1. statut.
de Winchest. ca.
1. 4. 5 H. 7.
fo. 5. 5 E. 3.
cap. 14.

Rot. parl. 50 E.
3. nu. 61.

* 5 E. 3. cap. 14.
2 H. 5. cap. 9.
8 H. 6. cap. 14.
Vid. 39 Eliz.
ca. 4.

7 R. 2. cap. 5.
Vid. 39 Eliz.
ca. 4.

C A P. XCI.
OF BANKRUPTS.

VIDE in the fourth part of the Institutes, cap. The Court of the Commissioners of Bankrupts.

C A P. XCII.
OF RECUSANTS.

1 Eliz. cap. 2.
23 Eliz. cap. 1.
28 Eliz. cap. 6.
35 Eliz. cap. 1, 2.
3 Jac. cap. 4.
7 Jac. cap. 6.
Lib. 10. 54. the
chancelour of
Oxfords case.
Lib. 11. 56, 57,
&c. Dr. Fosters
case.
Lib. 5. fo. 1.
Caudries case.
Dier 3 Eliz. fo.
203.

FIRST, the acts of parliament that are made against them are
1 Eliz. cap. 2. 23 Eliz. cap. 1. 28 Eliz. cap. 6. 35 Eliz.
cap. 1, & 2. 3 Jac. cap. 4. 7 Jac. ca. 6. These acts of
parliament are interpreted and expounded by divers judgements and
resolutions heretofore given. Lib. 10. fo. 54. &c. Le case de
Chancelour, &c. de Oxford, an exposition of the statute of 3 Jac.
ca. 4. et lib. 11. fo. 56, 57, &c. Doctor Fosters case, an exposi-
tion of all the said statutes. See lib. 5. fo. 1. &c. Caudries case,
See Dier, 3 Eliz. fo. 203. an exposition of the said act of 1 El. con-
cerning hearing of masse.

C A P. XCIII.

Of Newes, Rumours, &c.

Tacitus.

Int. leg. Alve-
redi, cap. 28.

SEE the second part of the Institutes, W. 1. cap. 34. Newes.
See also in the fourth part of the Institutes, cap. Chancery, in
the articles against cardinall Woolsey, artic. 32. *Convicia, si
irascaris, tua divulgas, spreta exolefcunt*; if you seek to revenge slanders,
you publish them as your own: if you despise them, they vanish.

The law before the conquest was, that the author and spreader
of false rumours amongst the people had his tongue cut out, if he
redeemed it not by the estimation of his head.

C A P. XCIV.

Of Weights and Measures.

SEE the second part of the Institutes, W. 1. cap. 4. and the exposition upon the same.

C A P. XCV.

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OF APPARELL.

DIVERSE acts of parliament have been made against the excess of apparell in the reign of E. 3. as 11 E. 3. cap. 2. & 4. 37 E. 3. ca. 8, 9, 10, 11, 12, 13, 14. 38 E. 3. 3. cap. 2. In the reign of E. 4. 3 E. 4. cap. 5. 22 E. 4. cap. 1. In the reign of H. 8. 1 H. 8. cap. 14. 6 H. 8. ca. 1. 7 H. 8. cap. 7. 24 H. 8. cap. 13. 33 H. 8. cap. 5. 37 H. 8. ca. 7. 1 & 2 Ph. and Mar. ca. 2. 4 & 5 Ph. and Mar. c. 2. 5 El. ca. 6. 8 El. ca. 11. 13 El. ca. 19. Some of them fighting with, and cuffing one another, some of them expired. But forasmuch as those that stood in force were obsolete, and remained but as snares to catch or vex men at the pleasure of the promooter; at the parliament holden *anno* 1 Ja. all acts of parliament before that time made concerning apparell are repealed and abrogated, and since that time no act hath been made concerning apparell, and so standeth the law at this day. Three costly things there are that doe much impoverish the subjects of England, viz. costly apparell, costly diet, and costly building. The best mean to repress costly apparell, and the excesse thereof, is by example: for if it would please great men to shew good example, and to weare apparell of the cloth and other commodities wrought within the realm, it would best cure this vain, and consuming ill, which is a branch of prodigality, and herewith few wisemen are taken. If you will looke into the parliament roll of 2 H. 6. you shall see what plain and frugall apparell that renowned king H. 5. after he was king did wear, his gown of lesse value then 40 s.

1 Jac. R. ca. 25.

Excesse of apparell is best cured, exemplo et vituperio.

Rot. parl. 2. H. 6 nu. 30.

Magna corporis cura, magna animi incuria.

Non induetur mulier veste virili, nec vir utetur veste fæminea: abominabilis apud Deum, qui facit hoc.

Deut. 22. 5.

C A P. XCVI.

OF DIET.

^a Rot. claus.
⁹ E. 2. m. 26 in
 dorss. intituled
*Ordinatio super
 mensuratione fer-
 eulorum.*
^b 2 E. 6. cap. 19.
⁵ E. 6. ca. 3.
⁵ El. ca. 5.
²⁷ El. ca. 11.
³⁵ El. ca. 7.
^{*} Lent 2. Saxon
Quinresme.
Quadragesima.
^c Hereof see the
 4. part of the In-
 stitutes, cap.
 The Court of
 Audience, &c.
 and Faculties.
^{*} Vide Britton
 cap. 53. and
 other books
 make mention
 of these.

^d Luc. c. 21. v.
 34. Rom. ca. 13.
 v. 13. Ecclesiast-
 icus, ca. 37. v.
 30, 31.
^e Ecclesiasticus
 31. 20.
^f Cicero.

Horace, 2. Ser. 2.

T H E R E was ^a an ordinance made by king E. 2. by advice of his counsell against the excesse of diet, but because it had not the strength of an act of parliament, it wrought no effect.

^b It is provided by statutes made in the reigns of E. 6. and queen Elizabeth, that no flesh shall be eaten on fish-days, viz. Friday, Saturday, embring days and vigils, and the time of ^{*} Lent; ^c and for licences to eat flesh on fish-days, &c. See the preamble of the statute of 2 E. 6. ca. 19.

Embring days, so called because in former times when they fasted they put ashes or embers on their heads. Job 2. 12. Jer. 6. 26. 2 Sam. 13. 19. And as the naturall conversion of the flesh of the body is to dust, so the sins of the soul (unrepented) are turned to fire, and this was shadowed under embers that ever keep fire.

^{*} These embring days are the week next before Quadragesima, so called, for that it is the fortieth day before Easter, and is the first Sunday in Lent. So Quinquagesima the Sunday fifty days before Easter, Sexagesima sixty days before Easter, and Septuagesima seventy days before Easter.

Before these late acts the eating of flesh on Fridays was punishable in the ecclesiasticall court, as yet it is, the jurisdiction being saved by the said acts.

But there is no act of parliament against excesse of diet, for it is known to be so hurtfull for mans body, and so obscureth the faculties of the mind, as the understanding, memory, &c. as to men, specially to Christian men, there needeth no law at all to be made, ever being mindfull of that caveat, ^d *Attende autem vobis, ne forte graventur corda vestra in crapula, et ebrietate, &c.*

^e *Vigilia, et cholera, et tortura viro infrunito; somnus sanitatis homini parco, dormiet usque in mane, et anima illius cum ipso delectabitur.* The morall heathen men by the light of nature agree hereunto. ^f *Tantum tibi et potus adhibendum est, ut reficiantur vires, non opprimantur.*

*Accipe tu, victus tenuis quæ, quantaque secum
 Afferat, imprimis valeas bene: nam variae res
 Ut noceant homini, credas, memor illius escæ,
 Quæ simplex olim tibi sederit: at simul assis
 Miscueris elixa: simul conchyliæ turdis:
 Dulcia se in bilem vertent, stomachoque tumultum
 Lenta feret pituita: vides, ut pallidus omnis
 Cæna defurgat dubia? —————*

Ex plenitudine generantur morbi, qui superant medicorum artem.

King

King Edgar permitting many of the Danes to inhabite here (^g who first brought into this realm excessive drinking) was in the end constrained to make a law against this excesse (which never commeth alone) driving certain nails into the sides of their cups, as limits, and bounds, which no man upon great pain should be so hardy as to transgresse.

William of Malmesbury, comparing Englishmen and Normans together, saith, that in his time, the English manner was to sit bibbing whole houres after dinner, ^h and that the Norman fashion was to walk the streets with great troops, with idle and loose serving-men following them, both which were causes of many disorders and outrages.

ⁱ If the excesse of drinking extend to the loathsome and odious vice of drunkennesse, it is punishable by act of parliament. And to say the truth the ancient Britains were free from this crime.

*Ecce Britannorum mos est laudabilis iste,
Ut bibat arbitrio pocula quisque suo.*

And the laws against drunkennesse are very new.

Nothing is here said against that great peacemaker, and branch of liberality, orderly hospitality, but against the dainty and disorderly excesse of meats and drinks, which is a species of prodigality: for it is provided by act of parliament that the grace of hospitality shall not be withdrawn from the needy.

See the statute of 37 E. 3. ca. 8. against excessive apparell and diet: but it was repealed in the next parliament, 38 E. 3. ca. 2.

^g From whence excesse of drinking in England came.

^h From whence troops of idle serving men came into England.

ⁱ 4 Jacobi, c. 5.

See 1 Ja. ca. 9.

7 Ja. ca. 10.

21 Ja. c. 7. an excellent law.

*Una salus sanis
nullam potare salutem.*

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W. 1. 3 E. 1.
ca. 1.

C A P. XCVII.

OF BUILDINGS.

WE have not read of any act of parliament now in force made against the excesse of building, or touching the order or manner of building; but it is a wasting evill, whereunto some wise men are subject.

But the common law doth prohibit any subject to build any castle, or house of strength imbattered, &c. without the kings licence, for the danger that might ensue. ^a Also the common law prohibiteth the building of any edifice to a common nuisance, or to the nuisance of any man in his house, as the stopping up of his light, or to any other prejudice or annoyance of him. *Ædificare in tuo proprio solo non licet, quod alteri noceat.*

^b In Deuteronomy it is said, *Cum ædificaveris domum novam, facies murum tecti per circuitum, ne effundatur sanguis in domo tua, et sis reus, labente alio, et in præceps ruente.*

^d I like well the counsell to a nobleman, whosoever gave it. *Si vis (ait ille) ædificare domum, inducat te necessitas, non voluptas; cupiditas ædificandi ædificando non tollitur; nimia et inordinata cupiditas ædificandi expectat ædificii venditionem; turris completa, et arca evacuata faciunt tarde hominem sapientem.*

Ædificare

See the 1 part of the Institutes.

sect. 1. fo. 5. a.

Vet. Mag. Cart.

1. part, fo. 162.

cap. Eschaetry,

&c. 14 H. 6. nu.

7. licence to the

D. of Glouc. to

imbattel Green-

wich.

^a Li. 9. f. 54. &

58. Lib. 5. fo.

101. &c.

^b Deut. 22. 8.

^c Battlements.

This was for

safety only.

^d Bernhard. consilium.

Euripides translated by Sir Th. Moor.

*Ædificare domos multas, et pascere multos,
Est ad pauperiem semita laxa nimis.*

To build many houses, and many to feed,
To poverty that way doth readily lead.

Of these three it hath been truly said: *Vestium, conviviorum, et ædificiorum luxuria ægre civitatis sunt indicia, et species prodigalitatis.*

Vide the like in the Regist. 36. b. Prohib. de decimis seperatis. In Epist. decret. Innocent. 3. l. 10. pag. 228.

Tr. 20 E. 1. Rot. 13 in banco Rich. de Turnys case. Eborum.

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* Lib. 10. fo. 27. Le case de Suttons hospitall. See the statute of 39 El. cap. 4. whereby authority is given to justices of peace to build and erect houses of correction, &c. ^a 39 El. ca. 5. 3 Car. ca. 1. ^b Tumba, tumulus, sepulchrum.

^c 9 E. 4. 14. the La Wiche case, wife of Sir Hugh Wiche. Mich. 10. Ja. in communi banco int' Corven & Pym.

But by the common law, and generall custome of the realm, it was lawfull for bishops, earls, and barons to build churches, or chappels within their fees: and hereof king John informed pope Innocentius the Third (naming only, *honoris causa*, the bishops and baronage of England, albeit this liberty extended to all) with request that this liberty to the baronage might be confirmed. To these letters the pope made this answer, *Quod enim de consuetudine regni Anglorum procedere regia serenitas per suas literas intimavit, ut liceat tam episcopis, quam comitibus, et baronibus ecclesias in feudo suo fundare, laicis quidem principibus id licere nullatenus denegamus, dummodo diocesani episcopi eis suffragetur assensus, et per novam structuram veterum ecclesiarum justitia non lædatur.* Whereas the baronage had absolute liberty before, now the pope addeth the consent of the bishop: but that addition bound not, seeing it was against the liberty of the baronage warranted by the common law: and we would not have rehearsed this epistle, but that it is a proof what the generall custome of the realm was concerning the building of churches by the baronage of England. And albeit they might build churches without the kings licence, yet could they not erect a spirituall politique body to continue in succession, and capable of indowment without the kings licence: but by the common law before the statutes of mortmain, they might have indowed this spirituall body once incorporated, *perpetuis futuris temporibus*, without any licence from the king, or any other.

And as the law is in cases of devotion and religion, so it is in cases of charity: any man may erect and build a house for an * hospitall, school, workinghouse, or house of correction, or the like, without any licence, for that is but a preparation, and may be done as owner of the soyl; but by the common law could not incorporate any of them without licence, but now he may, and indow them with lands in certain cases, ^a by the statutes of 39 Eliz. cap. 5. and 3 Car. ca. 1. as in the second part of the Institutes in the exposition of those statutes it appeareth.

Concerning the building or erecting of ^b tombs, sepulchers or monuments for the deceased in church, chancell, common chappell, or churchyard in convenient manner, it is lawfull, for it is the last work of charity that can be done for the deceased, who whiles he lived was a lively temple of the Holy Ghost, with a reverend regard, and Christian hope of a joyfull resurrection. And the defacing of them is punishable by the common law, as it appeareth in ^c the book of 9 E. 4. 14. a. And so was it agreed by the whole court, Mich. 10 Jac. in the common place, between Corven and Pym. And for the defacing thereof, they that build or erect the same shall have the action during their lives, (as the lady Wiche had in the case of 9 E. 4.) and after their deceases, the heir of the deceased shall have the action. But the building, or erecting of

of the sepulcher, tomb, or other monument ought not to be to the hinderance of the celebration of divine service. And in that case of Corven it was resolved, that albeit the freehold of the church be in the parson, yet if a lord of a mannor, or any other, that hath an house within the town or parish, and that he, and all those whose estate he hath in the mansion house of the mannor, or other house, hath had a seat in an isle of the church, for him and his family only, and have repaired it at his proper charges, it shall be intended that some of his auncestors, or of the parties whose estate he hath, did build and erect that isle for him and his family only; and therefore if the ordinary endeavour to remove him, or place any other there, he may have a prohibition. ^d It was further resolved, that if any man hath a house in a town or parish, and that he and those whose estate he hath in the house, hath had time out of mind a certain pew, or seat in the church maintained by him and them, the ordinary cannot remove him, (for prescription maketh certainty, the mother of quietnesse) and if he doe, a prohibition lyeth against him. ^e But where there is no prescription, there the ordinary that hath the cure, and charge of souls may for avoiding of contention in the church or chappel, and the more quiet, and better service of God, and placing of men according to their qualities and degrees, take order for the placing of the parishioners in the church or chappell publique, which is dedicate and consecrate to the service of God.

Nota, funerall expences according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatsoever, for that is *opus pium*, or *charitativum*.

Amongst the people of Almighty God, as it appeareth in the holy history, sepulture was ever had in great reverence, not only of kings, but of other men; as (amongst many others) good old Barzillai, when he had excused himself for not going with the king to Jerusalem, he concluded, *Obsecro ut revertar servus tuus, et moriar in civitate mea, et sepeliar juxta sepulchrum patris mei, et matris meae, &c.*

And also the morall heathens had building and erecting of sepulchers, or monuments in great account, as it doth appear by the seven wonders of the world, which for memory may be expressed in these few verses.

1. *Pyramides Memphis,* 2. *Babylonis mœnia celsæ,*
 3. *Templum ingens Ephesi virgo Diana tuum,*
 4. *Mausoli Cariae monumentum,* 5. *Raraque Pharo*
 - Turris,* 6. *Olympiaci splendida imago Jovis,*
 7. *Denique apud Rhodios splendentis statua Phœbi:*
- Hæc septem mundus mira, viator, habet.*

Besides the religious, and Christian regard abovesaid, these monuments do serve for four good uses and ends. First, for evidence, and proof of descents, and pedegrees. Secondly, what time he that is there buried deceased. Thirdly, for example, to follow the good, or to eschew the evill. Fourthly, to put the living in mind of their end, for all the sons of Adam must die. *Statutum est hominibus semel mori.*

Monumentum

Barth. Cassianus
fo. 13. Conclus.
29. Actio datur,
si quis arma in
aliquo loco po-
sita delevit, seu
abrafuit, &c.

^d 8 H. 7. 12. a.
per Hussy accord.
Pasch. 10 Jac.
in curia Cam.
Stellatae, inter
Hussy plaintiff.
& Kath. Layton,
& al' Defendants
issint resolve per
le court.

^e 8 H. 7. 12. a.
acc. 12 H. 7.
12. per Hussy.

2 Sam. 19. 37.

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Monumentum servat alicujus rei memoriam aliter interituram, eamque nobis repræsentat: and therefore a monument is called a memoriall.

Monumentum dicitur à monendo; quicquid enim nos monet est monumentum, ut sepulchrum, quod nos sumus mortales.

*Cum tumulum cernis, tum tu mortalia spernis:
Esto memor mortis, sisque ad cœlestia fortis.*

• Britton, fo.
84. b.

It is to be observed, that in every sepulcher, that hath a monument, two things are to be considered, viz. the monument, and the sepulture or buriall of the dead, * The buriall of the *cadaver* (that is *caro data vermibus*) is *nullius in bonis*, and belongs to ecclesiasticall cognisance, but as to the monument, action is given (as hath been said) at the common law for defacing thereof.

Stow in his Survey of London, fo. 19.

• For so is the truth.
Ro. Hovenden anno Dom. 1177.
Holl. eodem an. fo. 101. b. 20.

In the year of our Lord 1586, and in the 28 year of the reign of that glorious queen Elizabeth, was the old gate called Ludgate in the city of London (as Stow saith) taken down to be new builded: there was found couched within the old wall thereof a stone, wherein was graven in the Hebrew tongue and characters, * an epitaph, signifying in English: This is the tomb of Rabbi Moses son of the illustrious Rabbi Isaac: which certainly was before the 23 year of the reign of H. 2. *anno Domini 1177*, for before that time all the Jews in England were buried within the city of London, and in that year, saith Hovenden, *Dominus rex pater dedit licentiam Judæis terræ suæ habendi cæmeterium in qualibet civitate Angliæ, extra muros civitatum, ubi possunt rationabiliter, et in competenti loco emere, ad sepeliend' mortuos suos: prius enim omnes Judæi mortui Londoniâ ferebantur sepeliendi.*

8 H. 6. 32. 37.

And albeit churches or chappels may be built by any of the kings subjects, (as hath been said) without licence, yet before the law take knowledge of them to be churches or chappels, the bishop is to consecrate or dedicate the same: and this is the reason, that a church or not a church, a chappel, or not a chappel, shall be tryed, and certified by the bishop.

See for this dedication or consecration the 43 chapter of Ezechiel, the 23 chapter of Genesis, the 90 Psalme, the 24, 26, 27, 84, and 134 Psalms, the 2 of Samuel 6. 10 of Saint John, vers. 22. to the end.

Vide inter leges Edwardi Confessoris, cap. 3. Similiter ad dedicationes, ad synodos, et ad capitula venientibus, &c. in eundo, et redeundo sit summa pax.

De subterraneis, substructionibus, et cryptis.

We find in ancient times that vaults, hollow places, or substructions under the ground were made by men for receits, or receptacles for keeping of their wives, children, money, and goods secret, to avoide violence, and rapine in time of hostility or rebellion, and we find no law against them.

Tacitus.

These kind of buildings we had from the Germans, as we find it in Tacitus, who treating of the old Germans saith, *Solent et subterraneos specus aperire, et si quando hostis advenit, aperta populatur, abdita autem et defossa aut ignorantur, aut eo ipso fallunt, quod quaerenda sunt.* They use to build vaults under the earth, and if the enemy come, he destroyeth all open and above ground, but such things as lie hidden in the cave, either they lie unknown, or at least they deceive him, in that he is enforced to find them out.

Neither

Neither have we found any licence of the king to make them, nor punishment of any that made them without licence, and yet many have been made by many subjects, some whereof * we have seen.

^a We read of Alexander bishop of Lincoln, in the reigns of H. 1. and king Stephen, a Norman born, who was, *insanis substructionibus ad insaniam delectatus*.

^b No person can build or erect light-houses, pharos, sea-marks or beacons without lawfull warrant and authority.

Lumina noctivagæ tollit pharus æmula lunæ.

In light-house top is rear'd the light,
As high as the moon that walkes by night.

^c Provision was made by authority of parliament for building and erecting blockhouses, bulwarks, piles, and the like, for without parliament subjects cannot be charged with building ^d or erecting of them, and that act is expired.

^e The lord of the soil may build a windmill, sheepcote, dairy enlarging of a court necessary, or a curtilage in grounds, where men have common of pasture.

^f A man cannot erect any building upon his own ground in the kings forest, but it is a purpresture, and may either be demolished or arrented to the kings use, &c. at a justice seat.

Concerning houses of husbandry and tillage, the statutes of 4 H. 7. cap. 19. 7 H. 8. ca. 1. 27 H. 8. ca. 22. 5 E. 6. ca. 5. 5 El. cap. 2. are repealed by the statute of 21 Jac. cap. 28. and the statutes of 39 El. ca. 1. & 2. are expired, for that they were so like labyrinthes, with such intricate windings and turnings, as little or no fruit proceeded of them.

^g No man can erect an house or building to the nuisance of any other.

^h See where a man hath any house or mill, &c. and having any priviledge or thing appurtenant thereunto, and pull it down and build a new, where the priviledge or appurtenant remain and where not.

ⁱ Concerning the erecting, &c. of cotages, see the statute of 31 El. ca. 7. which could not be restrained in such sort as they are, but by authority of parliament.

There was a statute made *anno* 35 El. (when I was speaker) against buildings in the cities of London or Westminster, or within three miles of the gates of the city of London, and against the dividing and converting of any dwelling house or building into divers habitations, and against inmates, but that endured but for seven years, and until the end of the next session of parliament, which act, being holden dangerous, was not continued at the session of parliament holden in 43 Eliz. being the next session after the seven years, and therefore expired with the same. In the mean time there was a law made against new buildings, &c. which then was a warrant, and since hath been a colour for divers proceedings in courts of justice, not observing the expiration of that law; but now that law hath long since lost his force, and the ancient and fundamentall common law is to be followed.

Sylliva, or *fulliva* is a word derived from the Saxon *sylle*, and signifieth a poste, or plate fixed in the ground: the Saxon word

* In the manner of Minster Lovel in com' Oxon' &c.

^a Cambden Linc. pag. 406.

^b See the statute of 8 El. ca. 13. and the letters patents of the Lord Admirall.

^c 4 H. 8. ca. 1.

^d De propugnaculis, munitoris, munitoriis, &c. of bulwarks, barbicans, block-houses, piles, &c.

^e 13 E. 1. ca. 46. 32 Aff. 5.

^f 7 H. 4. 39.

^f 7 El. Dier 240.

^g See the 2. part of the Institutes. W. 2. ca. 24. lib. 5. fo. 101. lib. 8. fo. 46. lib. 9. fo. 54. 5^o.

^h See lib. 4. f. 84. Lutterels case, and the authorities there cited.

ⁱ 31 Eliz. ca. 7.

Lamb. perambulation of Kent. These words, you shall read in records concerning priviledges.

word is not yet out of use, for every man knows what a ground-fille is.

Pera, a peer, derived from the Latin word *petra*: *plance*, of the English word, planks, for boords or tables, in use also at this day.

Having spoken of erecting of houses and buildings, &c. we will tell you what we find in our books and records of dilapidation, and decay of buildings.

^k Dilapidation of ecclesiastical palaces, houses, and buildings is a good cause of deprivation.

¹ It appeareth by the statute of 4 H. 4. cap. 2. that *depopulatores agrorum* were great offenders by the ancient law, and that the appeal or indictment thereof ought not to be generall, but in special manner; and provides, that the offenders therein might have their clergy. They are called *depopulatores agrorum*, for that by prostrating or decaying of the houses of habitation of the kings people, they depopulate, that is, dispeople the towns.

Prohibitio regis quod incolæ de villa de Southampton non prosternent domos suas in alias migraturi regiones.

Simile pro magna Jermenutha.

That which may lawfully be prohibited before it be done, may be justly punished after it be done.

And herewith we will close up this chapter: that the law doth favour the supportation of houses of habitation, and use for mankind.

^k 29 E. 3. 16.
² H. 4. f. 3.
⁹ E. 4. 34.
¹ 4 H. 4. ca. 2.
lib. 11. fo. 29.
Alex. Poulters
case.

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Dorf. Claus.
an. 43 E. 3.
m. 23.
Rot. Claus.
anno 21 R. 2.
m. 15.
First part of the
Institutes, f. 54.
b. 56. b.

C A P. XCVIII.

De Lupanaribus et Fornicibus, &c.

Brothel-houses, Estuis, Bordelloes.

* Numb. 25. 9.
Deut. 23. 18.
Ezek. 16. 24. 31.
39. Joel 3. 3.
2. Mach. 4. 12.
Hospes meretricum
Lena. Leno,
unde Leno-
cinium.

THE keeping of them is against the law of God, on which the common law of England in that case is grounded. * *Non offeres mercedem prostibuli, nec precium canis in domo Dei tui, &c. Quia abominatio est utrumq; apud dominum Deum tuum.*

And the keeper, he or she, of such houses is punishable by indictment at the common law by fine and imprisonment: for although adultery and fornication be punishable by the ecclesiastical law, yet the keeping of a house of bawdrie or stewes, or brothel-house, being as it were a common nuisance, is punishable by the common law, and is the cause of many mischiefs, not only to the overthrow of the bodies, and wasting of their livelyhoods; but to the indangering of their soules. For the mischiefs ensuing hereupon, see 11 H. 6. cap. 1. 1 H. 7. fo. 6. 12. 13 H. 7. 6. 27 H. 8. Rot. Parl. 14 R. 2. nu. 32.

King H. 8. suppressed all the stewes or brothel-houses, which long had continued on the Bankside in Southwark, for that they were (as hath been said) prohibited by the law of God, and by the law of this land. And those infamous women were not buried in Christian

By proclamation
under the
great seale 30
Martij. 37 H. 8.

Christian buriall when they were dead, nor permitted to receive the rites of the church whilest they lived.

The word *estuis* or *stewes* is French, we having no English word for it.

Before the reigne of H. 7. there were eighteen of these infamous houses, and H. 7. for a time forbad them: but afterwards twelve only were permitted, and had signes painted on their wals; as a Boares Head, the Crofs Keyes, the Gun, the Castle, the Crane, the Cardinals Hat, the Bell, the Swan, &c.

Many wicked and common women had seated themselves in a lane called Water-lane, next to the house of the friers Carmelites in Fleet-street: this being an open and known wickednesse, king E. 3. to the end these friars might performe their vowes, one of which was, to live in perpetuall chastity, took order for removing of these women. The record saith, *Rex præcipit majori civitatis London quod amoveri faciat omnes mulieres meretrices in venella prope fratres Carmelitarum in Fletestreet inhabitantes.*

Read 3 Regum cap. 14. verse 24. eodem lib. cap. 15. verse 12. & 4 Regum cap. 23. verse 7.

And by the common law it appertaineth to the marshall of the kings house to free, or protect the court from *femes puteins*, which is more particularly explained by Fleta, who saith, *Mareschalli interest virgatam à meretricibus omnib' protegere et deliberare, et habet mareschallus ex consuetudine pro qualibet meretrice coi. infra metas hospitii inventa, 4^a primo die; quæ si iterum in baliva sua inveniatur, capiatur et coram seneschallo inhibeat eam hospitium regis, reginæ, et liberorum suorum, ne iterum ingrediatur, et nomina earum imbreventur: quæ si iterum inventæ fuerint hospic' sequutrices, tunc aut remaneant in prisona in vinculis, aut sponte prædic' hospicia abjurentur; quæ si autem tertio inventæ fuerint, considerabitur quod amputetur eis trefforia, et tondeantur; quæ quidem si quarto inveniuntur, amputentur eis superlabia, ne de cætero concupiscantur ad libidinem.*

14 R. 2. It is enacted that no estews or brothel-houses should be kept in Southwark, but in the common places therefore appointed.

So odious and so dangerous was this infamous vice (the fairest end whereof is beggery) that men in making of leases of their houses, did adde an expresse condition, that the lessee, &c. should not suffer, harbour, or keep any *feme puteine* within the said houses, &c.

See the case of 1 H. 7. the custome of London for entring into an house, and arresting of an advowtrer, and carrying her to prison. In ancient times adultery and fornication were punished by fine and imprisonment, and inquirable in turnes and leets by the name of Letherwite. We find in Domesday *De adulterio vero per totum Chent, habet rex hominem, (i. amerciamentum hominis) et archiepiscopus mulierem, (i. amerciamentum mulieris) &c.*

Vidua, si alicui se non legitime commisceat. 20 s. emendabit, puella vero 10 s. pro consimili causa.

Adulterium faciens 8 s. & 4 d. emendabit homo, et fœmina tantundem. Rex habet hominem adulterum, archiepiscopus fœminam.

But now these offences belong to the ecclesiasticall court.

Legrewita, or *logrewita*, *legergeld*, or *logergeld*, of *legre* or *logre* for a bed,

III. INST.

R.

a bed,

Fabian Chron.
Stowe.

In Dorf. Claus.
21 E. 3. part 1.
m. 6.

Fratres beatæ
Mariæ de Monte
Carmeli, called
White Fryers.

7 E. 3. fo. 23, 24.
Fleta lib. 2.
cap. 5. lib. 10.
Le case de Mar-
shallea, fo. 77.

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Rot. par. 14 R. 2.
nu. 32.

35 H. 6. Barre
162.

1 H. 7. fo. 6:
&c.

Domesday.
Chent. Dover.
Ibid. Cestriæ ci-
vitas.
Ibid. Sudsex
Lewes.
Domesday.
Hunedoiesc.
Bracton.
Fleta.
Rastall term.
leg. Stat. de ex-
posit. vocab.

a bed, and *wite amerciament*, by common speech *letherwite*, or *lairewite*, *lierwite*, *lotherwite*.

Childewite is for the lord to take a fine for his bondwoman defiled and begotten with childe.

Bawdry, *lenocinium*, unde *ribawdry et ribaude*. i. *Impudicus rabula*. See parliam. 50 E. 3. nu. 61. of ribauds and robertfmen.

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C A P. XCIX.

De Assentatione, Fucologia, Pseudologia, Flattery.

Int. leges Canuti, fo. 106. c. 7. Lam. Fatalis magnarum potestatum pestis, adulatio. Semper assentor id, quod is ad cuius voluntatem dicitur, esse magnum; ut in Terentio: magnas vero agere gratias mihi, &c. satis erat respondisse magnas, ingentes inquit.

WE find a law before the conquest against flatterers in these words, *Liccenar 7 Leogonar nepenar 7 neapenar goder gnaman habban*, &c. which Dr. Lambard translateth thus, *Assentatores, mendaces, prædones, et rapaces offensionem Dei gravissimam incurrant*, &c.

The ancient manuscript translateth it thus, *Seductores, mendaces, rapaces et raptores Dei gravamen habeant*. And both translations do in effect agree, for a flatterer is a seducer for some private end, by fained praise and humouring of another, whereby he hath an *oultrecuidance* of himselfe, his state, and actions, *isli ducunt et seducunt*.

The occasion of making this law was, that king Canutus had been seduced by flatterers, who had shewed him his face and state in a false glasse, making too great a shew of his own parts, actions, and state, to the end to make him conceit himselfe to be better and greater then he was, and his adversaries lesse, then in truth they were. Nay, this king by wicked flatterers assumed to him divine power and honour: for comming from sea, he set his feet on the sea strand, as the sea was flowing, and commanded the sea not to rise to wet his lordly and majestick feet nor clothes: the sea keeping on his accustomed course, both wet his feet and thighs also: whereat being fore amazed repented his presumption (which he had undertaken by wicked flattery.)

And well is the flatterer marshalled in this law with lyers, thieves, and raveners; for the divine described flatterers to be those, *Qui colunt aliquem, et auferunt ab eo aliquid temporarii boni*. So as it is *peccatum viscatum*, it getteth away much and giveth smoke.

And the Holy Ghost hath styled flattery *oleum peccatoris*, that is, the oile of the sinner, κατ' ἐξοχήν, that is, of him that exceedeth others in sinne, and doth affect greatnesse, that is the head, making it greater and more prosperous then it is, as you may reade in the prophet David: *Corripiet me iustus in misericordia, et increpabit me, oleum autem peccatoris non impinguet caput meum*. Whereby he being both a king and a prophet, preferreth the reproofe, nay the sharpe rebuke of the just and vertuous, before the smooth humouring of the

Psal. 141. 5.

the flatterer (*per nomen*) of the sinner. This *oleum peccatoris* is *mel venenatum, et venenum mellitum*, and commonly affecteth greatnesse, and is called lordbane.

And againe, David speaking of the flatterer saith, his words are smother then oile, and yet are they very swords. *Hæc dicit Dominus Deus, Væ qui consunt pulvillos sub omni cubito manus, et faciunt cervicalia sub capite universæ ætatis ad capiend' animas, &c.* Thus saith the Lord God, Woe to them that sow pillowes under all armes, and put kerchifes upon the heads of every age to hunt soules. They make the king glad with their wickednesse, and the princes with their lyes. *In malitia sua lætificaverunt regem, et in mendaciis suis principes.*

The flattering mouth worketh ruine. And more kings and kingdomes have been overthrowen by the means of flattery, then by publick hostility. And this is the cause that we have mentioned the said ancient law for their punishment, they be lawfully banished from princes courts, and subjects houses.

*Ut videat, cæco fit simia præda leoni:
Rex cæcus cernit, cum sycophanta perit.*

What fearfull ends flattering favourites, corruptors of their soveraigne liege lords, abusing their favours in subversion of their lawes, have had, appeareth in our parliament rolls, records, and histories.

^a King H. 3. had Hubert de Burgo chiefe justice and earle of Kent, and many others: but this was his safety, that upon just occasion without any great grief he could forgoe a favourite. See in the preface to the second part of the Institutes, his counsell to H. 3. to burne Magna Carta.

E. 2. had ^b Pierce de Gaveston, the ^c Spencers, &c. and the Spencers proceedings against *le grand charter* by name (amongst other things) tending to the subversion of law, &c.

R. 2. had ^d sir Robert Tresilian chiefe justice, &c. and Robert earle of Oxford and duke of Ireland, &c.

H. 6. had ^e William de la Pole duke of Suffolk, &c. who endeavoured to have brought in the civill lawes, which was the occasion that the chiefe justice Fortescue wrote in the commendation of the lawes of England, preferring them for the government of this land before the civill lawes. This duke with others plotted the death and destruction of Humfrey the good duke of Glouc. who ever stood in his way.

E. 4. had ^f William lord Hastings the kings chamberlaine, and captaine of Callice. All these came to fearfull and untimely ends.

R. 3. had ^g Sir John Catesby one of the justices of the common place, and Henry duke of Buck. &c. privy plotters and counsellors with R. 3. for the most execrable murder of his nephews E. 5. and Richard duke of York. What a miserable end the duke had, you know: and justice Catesby in his journey to London, in the kings high way had *subitanam et improvisam mortem*.

H. 7. had ^h Sir Richard Empson, Edmond Dudley, &c. Sir ⁱ H. 7. 10. ^h Coram rege an. 1 H. 8. In information vers. D. Peter & alios, ment against Edw. Dudley.

Psal. 55. 22.

Ezech. 13. 18.

Osee 7. 3.

Prov. 26. 28,

Qu. Curtius,

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Nota, enemies to lawes punished by the lawes.

^a Rot. pat. anno 17 H. 3. Nos

integre et firmiter tenebimus

judicium de Huberto de Burgo,

per barones datum. Speed 18

H. 3. 520.

^b Rot. parl. 7 E.

2. Ne quis occasionetur per

mortem Pet. de Gaveston. Hil.

318. a. & ibid.

321. a.

^c Vet. Mag.

Cart. 2 part 44.

ib. 50. exilium Hugonis,

& 54. Ne quis

occasionetur pro

feloniis in prosecutione d' Spencer patris & filii.

^d Rot. parl.

11 R. 2. nu. 8,

&c.

^e Rot. parl.

28 H. 6. nu. 19.

untill 47.

^f Hollensh. 713.

a. 30.

^g Hollensh. 722.

748. 767. a.

The like indict-

Richard Empson was indicted, *Quod ipse consiliarius excellentissimi principis Henrici nuper regis Angliæ septimi Deum præ oculis non habens, sed ut filius diabolicus subtiliter imaginans honorem, dignitatem, et prosperitatem dicti nuper regis, ac posteritatem regni sui Angliæ minime valere, sed ut ipse magis singulares favores dicti nuper regis adhibere, unde magnat' fieri potuisset, ac totum regnum Angliæ secundum ejus voluntatem gubernare, falso, deceptivo, et proditorie legem Angliæ subvertens, diversos ligeos ipsius nuper regis, ex sua falsa covina, et subtili ingenio, contra communē legē regni Angliæ de diversis felonis, &c. indictari fecit, &c. per quod plures et diversi populi dicti nuper regis hiis gravaminibus, et indebitis exactionib' multipliciter torquebantur, in tantum quod populi dicti nuper regis versus ipsum nuper regem multipliciter murmurabant, et malignabant, in magnum periculum ipsius nuper regis regni sui Angliæ, ac subversionem legum et consuetudinum ejusdem regni, &c.* And the like indictment was against Dudley.

Tr. 23 H. 8.
coram rege.
Rot. 14.

H. 8. had Thomas Woolsey cardinall. *Ipse intendens finaliter antiquissimas Angliæ leges penitus subvertere, et enervare, universumq; hoc regnum Angliæ et ejusdem regni populum legibus imperialibus, vulgo dict', legibus civilibus, et earundem legum canonibus subjugare et subducere, &c.*

We will for some causes descend no lower. *Qui eorum vestigiis insistant, eorum exitus perhorrescant.*

But that right be done to him, who was a faithfull favorite and counfeller to this king, we have seen a manuscript that relateth, that Charles Brandon duke of Suffolk a wise and warlike person, was for many years before his decease the greatest favourite the king had, upon whom he chiefly relied in all his weightiest affairs. This noble duke deceased in August in the 37 year of the reign of king H. 8. After whose death the next time the king sat with his counsell, and missing the good duke, grievously lamented for him, and said, that when I was offended with any (as often I was) and acquainted him therewith, that he ever endeavoured to mitigate my displeasure, and never spake to me evill of any of them. And the king looking upon the lords of his counsell one after another, said, and so (my lord) cannot you say, perusing them all throughout. A royall commendation of this great Duke, and a great argument of his piety and honour, that no subject had ever the indignation or displeasure of his soveraign, by any private whispering of his.

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Anno 5 R. 2.
Th. Wals.
p. 281.

Read the story,
and see the most
lamentable
estate of those
times. Note
these three PPP.

We will conclude this chapter with one of our own histories. *Generaliter cunctorum habitatorum terræ peccatis inclusive ordines sumendo mendicantium ad cumulandum causas malorum, &c. isti possessionatis invidentes, procerum crimina approbantes, commune vulgus in errore foventes, et utrorumque peccata comedentes, pro possessionibus acquirendis, qui possessiones renunciaverant pro pecuniis congregandis: qui in paupertate perseverare juraverant, dicunt bonum malum, et malum bonum, seducentes principes adulationibus, plebem mendaciis, et utrosque secum in devium pertrahentes, &c.* Note what is said, that the full heap of the causes of Gods vengeance in those days, was made up by those flattering preaching friers. But parliaments, palaces of princes and pulpits should be free from adulation and flattery.

C A P. C.

Of false Imprisonment.

SEE the second part of the Institutes, the statute *de 1 E. 2. de frangentibus prisonam*, and the exposition upon the same.

See the Petition of Right 3 Car. regis, and Mag. Cart. ca. 29. And it is to be observed that before the conquest it was thus provided. *Qui hominem paganum immerentem vinculis constrinxerit, 10 solidis noxiam sarcito; cum si verberibus affecerit, 20 solidorum pena esto; si suspensum in sublime rapuerit, 30 solidis culpa pensatur; si contumeliose capillum ejus morionis in morem totonderit, 10 solidi præstato; sin caput in morem sacerdotis raserit, nec ipsum ligaverit, 30 solidos numerato; si barbam illi rescaverit, 20 solidorum compensatio sequitur; si denique ei vinculis constricto capillos in morem sacerdotum abraferit, 60 solidos pendito.*

Int. leges Alveredi cap. 31.

By way of addition, here it is necessary to be known, how and by what means one that is in prison may be discharged. Every man that is in prison, either is imprisoned without lawfull *mittimus* (whereof we have spoken before *ubi supra*, and how he may be freed from imprisonment in that case) or with lawfull *mittimus*. He, that is lawfully imprisoned, is either imprisoned by lawfull commandment, and order or warrant, or by the kings writ: by commandment and order of any court of record; and this commandment, warrant or writ is either for causes not being treason or felony, misprision of the same, nor other publique offence or cause, or inferiour causes to these; as contempts, private actions or suits. If any court of record commit a man for a contempt done in court, they may discharge him by like order at their pleasure: but if they having authority, doe commit him for treason, felony, or other crime, or for suspicion of the same, they cannot discharge him, untill he be inquired of, and either indicted and acquitted, or an *ignoramus* found, and delivered by proclamation. ^a And so it is if any be taken and imprisoned by lawfull warrant, or the kings writ for treason, felony, or other crime, &c. he cannot be discharged by any without legall proceeding (but by the king only.)

^b If a vagrant, refusing to serve, had been committed to prison upon the statute of 23 E. 3. of labourers by the lord of the town, or justice of peace, they might have discharged him, even as the chancellor, &c. may commit a man for a contempt before him in court, and discharge him again at his pleasure.

^c If a man be taken by the kings writ in an action of debt or another private action, the plaintiff may discharge the gaoler of him, and set him at liberty, though he be in execution: but if he be taken in an appeal of death, robbery, rape, * &c. the plaintiff cannot discharge him, because it is a publique offence, wherein the king hath an interest, and he may after nonsuit by the plaintiff be arraigned at the kings suit.

There are two great adversaries to the due execution of these laws

^a For bailment See the statute of Mag. Cart. ca. 29. W. 2. ca. 15. and the exposition thereof.

1 & 2 Ph. and Mar. ca. 13.

2 & 3 Ph. and Ma. cap. 10.

^b 14 H. 6. 8.

F. N. B. 167. b. See 12 H. 6. 3.

^c Mich. 13 Jac. in banke le Roy.

Int. Withers & Herly, adjudge accord.

27 H. 8. 28. b.

1 R. 2. ca. 12.

10 H. 7. 3. a.

per Vavasor.

13 E. 3. Bar.

253.

*[210]

Fortescue ca. 53.
10. 127. b.

(as before hath been touched) especially in criminall causes, viz. *præcipitatio, et morosa cunctatio*. Precipitation; as a man or woman to be committed to prison, and within so short a time to be indicted and arraigned, as it is not possible for them to send for, or procure their witnesses; this certainly is precipitation; for the law both in reall and personall actions doth give the party tenant or defendant a convenient time without respect of persons to answer, &c. much more it ought to be in case of life. *Nec unquam in judiciis tantum eminet periculum, quantum parit processus festinatus*: and again, *crebra in deliberationibus judicia maturescunt, in accelerato processu nunquam*, and specially in case of life. As for *morosa cunctatio*, troward or weyward delay; see the second part of the Institutes, Glouc. ca. 2. 9. And we will conclude this chapter with the rule of law, *Quod in criminalibus, probationes debent esse luce clariores*.

C A P. CI.

Of Judgements and Execution.

JUDICIUM is derived à jure, et dicto, et est quasi juris dictum and therefore if the judgement be erroneous, both the judgement and execution thereupon, and all the former proceedings shall be reversed by writ of error: but if the former proceeding and judgement be good, if the execution be erroneous, the execution shall only be reversed: and because the judgement is the guide and direction of the execution, we shall treat principally of the judgement, and incidently of execution.

Of judgements, some be by the common law, and some by statute law, and some by custome.

Of judgements by the common law, some be in criminall causes, or pleas of the crown, concerning the life of man (whereof we are principally to intreat,) and of these some be expressed, and some implied. Other judgements at the common law be in actions reall and mixt, of which, some be *judicia interlocutoria*, and some *ultima seu principalia*: and again, *de principalibus, quædam sunt finalia, et quædam non sunt finalia*. Of judgements by statutes, some be in criminall causes, and some in common pleas: but judgements by custome are only in common pleas.

6 El. Dier 230.
See before in the
chapter of Treason.

All pleas of the crown, concerning the life of man, are divided into treason and felony; and treason, into high treason, and petit treason; and felony into all the severall branches abovesaid. And as in the case of high treason, (as it hath before appeared) some be far more horrible and odious then other, yet (one case excepted, as before hath appeared) one and the same judgement is given for all. So in cases of petit treason, one judgement is given in all, nay in all the severall cases of felony, though some be far more hainous then other, yet all being but felony, one and the same judgement is given. See the judgement and forfeiture in cases of treason, felony, &c. in the severall titles thereof, these we will adde.

Judgement

Judgement in High Treason.

*Et super hoc visis, et per curiam hic intellectis omnibus et singulis præmissis, * consideratum est, quod prædictus R. usque furcas de T. 1 trahatur, et 2 ibidem suspendatur per collum, et vivus ad terram prosternatur, et 3 interiora sua extra ventrem † suum capiantur, 4 ipsoque vivente comburantur, et 5 caput suum amputetur, quodque 6 corpus suum in quatuor partes dividatur; ac 7 quod caput et quarteria illa ponantur, ubi dominus rex ea assignare vult.*

li. 3. fo. 118, b. *Crimen læsæ majest. ut si contra personam ipsius regis sit præsumptum, quod quidem crimen omnia alia crimina excedit quoad pœnam.* Idem. l. 3. f. 104. b. maketh mention of execution, laqueo et securi, parliam. 21 R. 2. inter placita coron. nu. 50.

Implied in this judgement is, first, the forfeiture of all his manors, lands, tenements, and hereditaments in fee-simple, or fee-tail of whomsoever they be holden. Secondly, his wife to lose her dower. Thirdly, he shall lose his children (for they become base and ignoble.) Fourthly, he shall lose his posterity, for his blood is stained and corrupted, and they cannot inherit to him or any other auncestor. Fifthly, all his goods and chattels, &c. And reason is, that his body, lands, goods, posterity, &c. shall be torn, pulled asunder, and destroyed, that intended to tear, and destroy the majesty of government. And all these severall punishments are found for treason in holy scripture.

1 Reg. 2. 23. &c. *Joab tractus, &c.*

Esther, 2. 22, 23. *Bithan suspensus, &c.*

Acts, 1. 18. *Judas suspensus crepuit medius, et diffusa sunt viscera ejus.*

2 Sam. 18. 14, 15. *Infixit tres lanceas in corde Absolon cum adhuc palpitaret, &c.*

2 Sam. 20. 22. *Abcissum caput Sheba filii Bichri.*

2 Sam. 4. 11, 12. *Interfecerunt Baanan et Rechab, et suspende- runt manus et pedes eorum super piscinam in Hbron.*

Corruption of blood, and that the children of a traitor should not inherite, appeareth also by holy scripture.

Psal. 109. 9, 10, 11, 12, 13. *Mutantes transferantur filii ejus, et mendicent, et ejiciantur de habitationibus suis, et diripient alieni labores ejus, et dispereat de terra memoria ejus.*

^a The judgement of a woman for high treason is to be drawn and burnt.

^b Sir Andrew Harkley earl of Carlisle, convicted, degraded and attainted of treason.

Judgement in Petit Treason, where he is convicted thereof by Verdict or Confession.

Super hoc visis, &c. ut supra, consideratum est, quod prædictus R. usque furcas de T. trahatur, et ibidem suspendatur per collum, quousque mortuus fuerit.

But a woman is to have judgement to be drawn and burnt, as well in case of petit treason as high treason, and ought not to be

R 4

beheaded,

Pl. Com. 387. b.

See Stanford

182. d. e. lib.

Int. Co. 361.

* See the book of Judgescap. 19.

ver. ult. Consider, consult, and give sentence.

19 H. 6. 47.

Trahe, pende, et disclose. Braet.

† [211]

35 H. 8. Br.

Forfeiture. 99.

Drawing.

Hanging.

Bowelling.

The heart, &c. while he lived.

Beheaded.

Quarters hanged up.

Damnatae memoriae.

^a 25 E. 3. 42. b.

Coron. 130.

Brit. ca. 8. f.

16. b. accord.

^b Degradati.

Hil. 18 E. 2.

Coram rege rot.

34, 35. Wal-

ling. p. 118.

19 H. 6. 47.

Com. Caesar.

ante Christum

natum 1600 an-

nis, what the

judgement was

for petit treason.

1 R. 3. f. 4.

25 E. 3. 42.

12 Aff. 30.

beheaded, or hanged. *De morte mariti si compertum est uxorem, &c. igne Britanni interficiunt.*

Bracton, li. 3. fo. 105. a. *Ignem concremantur qui salutem dominorum suorum infidiaverint, idem fo. 104. b.*

Judgement in Felony, where he is convicted thereof by Verdict or Confession.

6 E. 4. 4. a. & b.

See the Preface to the sixth part of Reports, what the law was before the conquest anno domini 995. in case of felony.

* Paich. 20 R. 2. coram rege, rot. 1. Lincoln.

See before cap. Murder.

Et super hoc visis, &c. ut supra, consideratum est quod predictus R. suspendatur per collum, quousque mortuus fuerit. Bracton, lib. 3 fo. 104. b. speaketh, de laqueo.

And it is a maxime in law, that execution must be according to the judgement, *Ea quæ in curia nostra rite acta sunt, debent executioni demandari debent*: * and for expresse authority, *non licet felonem pro feloniam decollare*; and yet some examples are to the contrary.

True it is that the lord of Hungerford of Heytesbury was in 32 H. 8. attainted of buggery, and had judgement to be hanged by the neck, untill he was dead; and yet on the twenty eight day of July in the same year was beheaded at the Tower Hill. But as true it is, that Thomas Fines lord Dacres of the South, in anno 33 H. 8. was attainted of murder, and had judgement to be hanged by the neck, untill he was dead, and according to the judgement was hanged at Tiborn the twenty eight of June in the same year. And true it is, that Edward duke of Somerset was attainted of felony in anno 5 E. 6. and had judgement to be hanged by the neck untill he was dead, and on the twenty second of February in the same year was beheaded at the Tower Hill. And as true it is, that 3 & 4 Ph. and Mar. the lord Stourton was attainted of murder, and had judgement to be hanged by the neck untill he were dead, and according to the judgement, the sixth of March in the same year was hanged.

In case of high treason, beheading is part of the judgement, and therefore the king may pardon all the rest saving beheading, as is usually done in case of nobility. But if a man being attainted of felony, be beheaded, it is no execution of the judgement, because the judgement is, that he be hanged, untill he be dead. In this case the judgement doth belong to the judge, and he cannot alter it, the execution belongs to the sheriff, &c. and he cannot alter it. And if the execution might be altered in this case, from hanging to beheading, by the same reason it might be altered to burning, stoning to death, &c. To conclude this point, *Judicandum est legibus, non exemplis, and judicium est juris dictum, et executio est executio juris secundum judicium.*

The forfeiture in case of petit treason and felony (which is implied in the judgement) is all one, which you may read in the first part of the Institutes. sect. 747.

Quando peccaverit homo, quod morte plectendus est, et adjudicatus mortis appensus fuerit in patibulo, non permanebit ejus cadaver in ligno, sed in eadem die sepeliatur. And the reason that divines yeeld hereof is, for that by the execution of the judgement by death, the law is satisfied, and abhorreth cruelty, and in that case, *mors dicitur ultimum supplicium.*

And herein this is observable, that in treason and felony, the judgement

Deut. 2. 13.

Vide Hil.

1 H. 5. Rog. Actons case.

ment is only of the fatall and corporall punishment, and nothing of the forfeiture, which is implied, but in common pleas the judgements are more particular.

Judgement in Appeal, when the Defendant joyning Battail is vanquished in the Field, &c.

If the defendant in appeal be vanquished in the field, the record reciteth the vanquishing in the field. *Ideo consideratum est, quod* *sus. per col.* and so it is when the defendant is vanquished and slain in the field, yet the judgement is *ut supra*. Otherwise there should be no escheat: see the second part of the Institutes, W. 1. ca. 14.

8 E. 3. Judgement, 225.

Judgement in Treason or Felony, wherein neither any corporall Punishment or Forfeiture is expressed.

In case of treason or felony, if any person be outlawed, the judgement upon the exigent at the fist county court upon default of the party is, *Ideo, &c. per judicium coronatoris domini regis comitatus prædicti, utlagatus est.* Which writ being duly returned of record by the sherif, the party shall have the like corporall punishment, and shall lose and forfeit as much as if he had appeared, &c. and judgement had been given against him in case of treason or felony respectively. And note that in these words (*ideo utlagatur*) both the corporall punishments and forfeiture also are implied: and if the proceeding therein, or the judgement be erroneous, and upon his appearance upon the *capias utlagatum*, if it appear to the court (whereof any man, as *amicus curie*, may inform the court) that the party may either avoid the outlawry against him by writ of error, or by plea, the court ought not to award execution against the party, but assign him or her counsell learned, and require him or her by their advice, either to bring a writ of error or plead: but if the party refuse to bring his writ of error or plead after convenient time be given, if the outlawry be erroneous and not void, the court may award execution. And so it was resolved, *termino Hil. anno 3 Jacobi regis*, by the whole court in the kings bench, and divers presidents thereof shewed in the reigns of H. 6. E. 4. and one in the reign of queen Eliz. which we saw; for as long as the attainder by outlawry standeth in force, the party outlawed cannot be drawn in question by any new indictment or appeal for the treason, or felony, for the which he was outlawed: for *auterfoitz attaint* for the same offence is a good plea to free him from answer in that cause, albeit the record be erroneous. But if the attainder or outlawry be void against him, then may he be either arraigned upon the former indictment, or appeal, or newly indicted, &c. if there be cause. And therefore the judges are to take due consideration of the whole record of the attainder or outlawry, that they may be truly informed of the true state of the cause, before they award execution of death against him upon the outlawry. Read Bracton, lib. 3. tract. 2. cap. 14. and Britton, cap. 13. fo. 20, 21. excellently treating hereof, and Fleta, lib. 1. cap. 27.

Regist. 164. b. Fecit feloniam pro qua utlagatus fuit.

19 H. 6. 2. a. Error Fi. 26. 28 E. 3. 91. a. 6 H. 4. 6. 9 H. 7. 19. b.

Hil. 3. Ja. coram rege per curiam.

Auterfoits attaint de mesme le offence.

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Vide 6 E. 3. 55. in Aiel. 12 E. 2. Esch. 14. 19 E. 2. Cor. 387.

Bract. li. 3. f. 131. Britton. fo. 20, 21. Fleta li. 1. ca. 27.

And by the common law *auterfoitz attaint, &c.* of the same felony was a good plea as well in an indictment as in appeal by the common

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mon law. See the statute of 3 H. 7. cap. 1. concerning appeal of death: so as in an appeal of death, at the suit of the party, *auterfoitz attaint de mesme le mort*, is no plea at this day, but in case of an indictment of death at the suit of the king, *auterfoitz attaint de mesme le mort* in appeal is a good plea. *Auterfoitz attaint de murder* is a good plea to an indictment, &c. of petit treason of the same death, for in effect it hath the same judgement, and the self same forfeiture. So likewise if a man be attainted of manslaughter, it is a good bar to an indictment of murder of the same death, *et è converso*.

Auterfoitz attaint dun auter offence.

28 E. 3. 90. b.
Dier 4 Eliz.
Stones case.
6 H. 4. 6.
10 H. 4. coron.
237. 6 E. 3.
cor. 394. 22 E. 3.
cor. 471. Stanf.
f. 107, 108.
See 44 E. 3. 44.
7 H. 4. 31.
4 E. 4. 11.
* 1 H. 6. fo. 5.
Rot. Par. 3 R. 2.
nu. 18. Jo. Imperials case.

By the common law if a man were attainted of a felony done by him, and admitting he were after pardoned, he cannot at the suit of the king be impeached for any felony whatsoever before his said attainder by him committed, for by the attainder he was *mort in ley*; and in that case he had the judgement due for felony, viz. *sus. per col.* But the party may have his appeal of robbery, for a robbery done before the felony, whereof he was attainted, because in the appeal he is to have restitution of his goods, besides judgment of death. * And if the party attainted of felony had committed high treason before his attainder, he shall answer to the treason notwithstanding his attainder of felony, because the king by the treason was intitled to have the forfeiture of all his lands, of whomsoever they were holden. Also for high treason there is another judgement being an offence of an higher nature: but being attainted of felony, if he commit treason afterwards, he shall answer thereunto, because it is of higher nature then the felony, but it shall not devest the right of escheat, which lawfully was by the felony vested in the lords, contrary to the opinion of justice Stanford in that case, for the act and offence of the party shall not devest the lawfull escheat of the lords: but if a man be attainted of treason, he cannot be after attainted of a former treason, *causa qua supra*.

Dier 14 El. 308.
Cobhams case.

Where a little before it is said, that a felon by his attainder is *mort in ley*, it is to be understood of such former offences as require *pœnam mortis*: for notwithstanding the attainder, his body remains subject to arrests and execution for debts, &c. *Vide hic paulo post*, Trussels and Prestals case *in margine*. Albeit for felony a man be adjudged to his penance, *pain fort et jure*, yet he may be impeached for any former felony, because, the judgement is not given for the felony, but for his contumacy.

If a man be attainted of petit larceny, he may be after attainted of a felony, for the which he shall have judgement of death, because it is an higher offence, and is to have an other judgement.

Auterfoitz acquite, and the Judgement thereupon.

See Stanf. 105. a.
& b. &c.

But *auterfoitz acquite*, must be of the same felony, and albeit he be acquit of the latter felony, yet may he be arraigned of any former felony: and so it is in case of treason, *auterfoitz acquite* of treason must be of the same treason, for it acquiteth no other, because he ever remained a person able.

3 H. 7. ca. 1.
15 E. 3. tit.
Coron. 116.
15 Aff. p. 7.

And albeit at this day in an appeal of death, *auterfoitz acquite*, upon an indictment of the same death is no bar, yet in an indictment

ment of death, *auterfoitz atteint de mesme le mort* in an appeal is a good bar.

In an indictment or appeal of death, if it be found that he killed him in his * own defence, he is acquitted of the felony for ever.

It appeareth in Vauxes case, that if a man be erroneously acquitted of felony by verdict and judgement thereupon given, yet if the indictment, &c. be insufficient, he may be indicted againe for the reasons and causes in that case reported, which you may reade there at large, and need not here be repeated: and thereunto this we wil adde, that the reason, wherefore upon an erroneous judgement of condemnation, the party as hath been said) is driven to his writ of error; and in the case of an erroneous judgement of acquittall, that no writ of error needeth to be brought by the king, but the offender may be newly indicted, &c. is this, that in the case of condemnation the judgement is, *Quod suspendatur, &c.* which is the judgement of law due for the offence, and ought to be given therefore, and can have no other intendment: but in the case of acquittall the judgement is, *Quod eat sine die, &c.* which may be given as well for the insufficiency of the indictment, as for the parties innocency, or not guiltinesse of the offence. And the judges of the cause ought before judgement to look into the whole record, and upon due consideration thereof to cause it to be entred, *Ideo consideratum est quod eat sine die*; which upon that report, and this addition implied therein, we hold may satisfie the studious reader.

Lib. 4. fo. 44. 45.

And so it was adjudged Mich. 33 & 34 Eliz. coram rege, in an appeale of death between Katherine Wrote and Tho. Wiggles. Vid. 19 E. 3. Barre 444.

Vi. 3 H. 4. fo. 3. 11.

Auter foitz conviēt de mesme le Felony devant Judgement.

For this division see Holcrofts case before in the chapter of Murder, and Lib. 4. fo. 45, 46. where the statute of 3 H. 7. cap. 1. is well expounded: and the second part of the Institutes artic. super Cart. cap. 3. & Lib. Intr. Co. fo. 53, 54, &c. and Lib. 4. fo. 40. Wetherels case. And Stanford, Lib. 2. cap. 37. in pl. coron.

Lib. 4. fo. 45, 46. Holcrofts case. Second part of the Institutes, art. super cart. cap. 3. Lib. Intr. Co. 53, 54, &c. Lib. fo. 40. Wetherels case. Stanf. lib. 2. ca. 37.

* Before the statutes of 8 Eliz. cap. 4. and 18 Eliz. ca. 6. If a man had committed divers felonies, if he had been indicted of the last, and had benefit of his clergy, he could not have been impeached for any of the former felonies, albeit for the same he could not have had his clergy: by that act it is provided, that notwithstanding the allowance of such clergy, he may be impeached for any former offence, for which he could not have had his clergy.

* *Auter foitz conviēt. dun auter felony.* 25 E. 3. cap. 5. pro Clero.

Judgement to reverse an Outlawry for Treason or Felony.

The judgement to reverse an outlawry of A. B. in case of treason or felony in a writ of error is: *Ideo consideratum est quod utlagaria prædicta ob errorem prædicti et alios in recordo et processu prædicti. compert, revocetur, annulletur, et penitus pro nullo habeatur, et quod prædicti A. B. ad communem legem, et omnia quæ occasione utlagariæ prædicti. amisit, restituatur, &c. et quod ipse eat sine die.*

Vid. Pasc. 39 E. 3. rot. 95. Scire fac. Dominis mediatis & immediatis

If the outlawrie be avoided by plea, then the judgement is, *Ideo consti-*

consideratum est quod prædictus A. B. de utlagaria prædicta exoneretur, et quod ipse ad communem legem, et omnia, quæ occasione utlagariæ prædictæ amisit, restituatur, et ea occasione non molestetur in aliquo, nec gravetur, sed sit, et eat inde quietus.

If A. B. be indicted of treason or felony in the kings bench, or if he be indicted before commissioners of oier and terminer, or any other, and the indictment of treason or felony is removed into the kings bench: and by proces out of the kings bench he is erroneously outlawed and so returned, a writ of error may be brought in the kings bench for reversall thereof.

And where it is holden by some, that if any person be attainted of high treason by the common law, that no writ of error should be brought for the reversall of that attainder by reason of these words of the statute of 33 H. 8. cap. 20. viz. And if any person or persons shall be attainted of high treason by the course of the common law, &c. that every such attainder by the common law shall be of as good strength, value, force, and effect, as if it had been done by authority of parliament. But the contrary hereof was resolved at a parliament holden anno 28 Eliz. that a writ of error should be maintained for the reversall of erroneous attainders of high treason by the common law: for that statute of 33 † H. 8. is to be intended of lawfull attainders by the due course of the common law, and not of erroneous or void attainders. And thereupon at that parliament holden anno 28 Eliz. an act was made, That no record of attainder of any person or persons, of or for any high treason, where the party so attainted ‡ is or hath been executed for the same treason, shall be, &c. in any wise hereafter reversed, undone, avoided, or impeached by any plea, or for any error whatsoever.

* And albeit judgement be given against a man in case of treason or felony, yet his body is not forfeited to the king, but untill execution remains his own. And therefore before execution, ^a if he be slain without authority of law, his wife shall have an appeal; for notwithstanding the attainder he remained her husband. And after such attainder his body may at the suit of a subject be taken in execution upon a judgement or statute, &c. And he may be executed for treason or felony, notwithstanding such execution had against him. And in an action of debt, or other action brought against a person attainted, he cannot plead the attainder, and demand judgement, if during the attainder he shall be put to answer: ^b for upon consideration had of the books in 11 Aff. 27. 2 E. 4. 1. 4 E. 4. 8. 6 E. 4. 4. 6 H. 4. 6. 8 Eliz. Dier 245, &c. ^c it was adjudged that the person attainted should not plead the said plea, but should be put to answer. And there is a great diversity between an attainder of treason or felony, and an entry into religion; for he that is attainted of treason or felony hath capacity, and ^d may purchase lands to him and his heirs, ^e but so cannot he that is entred into religion. And it is against a rule in law, that any man of full age should be received in any plea by the ^f law to disable his own person, ^g or take advantage of his own wrong. And if the person attainted be beaten or maimed, or a woman attainted be ravished, after pardon, they shall have an action of battery, appeale of mayme, or rape. See Lib. Intr. Co. 247, 248.

In

Stanf. pl. cor. 18. k. 1.

33 H. 8. cap. 20.

† Nota, this act extends only to attainders of treasons before the act of 28 Eliz. where the party hath been executed, and not to attainders of treasons afterwards.

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* What interest the king hath in the body of the attainted before execution.

^a 35 H. 6. 63.

^b See Britton, ca. 122. Fleta, lib. 6. cap. 6. 7. ^c Mich. 38 & 39 Eliz. in comuni banco int. Banister and Trussel attaint de felony.

Vide Mich. 33 & 34 Eliz. coram Rege rot.

532. int. Ognel and Trussel.

Mich. 32 Eliz. inter Wade plaintife, and Prestal defendant attaint de haut treason, coram rege. Vid. sup.

^d See the first part of the Institutes, sect. 1. §. Car. si home purchase.

^e Ibid. sect. 199. 200. mort in ley

^f First part Inst. sect. 405.

^g 45 E. 3. 5. a.

18 E. 4. 25.

15 E. 4. 5. a.

&c. Lit.

^h In antient time a man indicted or appealed of life or member, or imprisoned, &c. should not be compelled to answer at other mens suits, but (as before it appeareth) these opinions have been justly changed.

ⁱ There was a notable case adjudged in the kings bench Mic. 26 & 27 Eliz. wherewith I was well acquainted concerning the matters of outlawry and errors before spoken of, which was in effect as followeth.

Ninianus Mervile nuper de Stedwich in com' Dunelm. ar' anno 1 & 2 Ph. and Mar. was indicted in the kings bench of high treason, and upon proces he was outlawed, and so returned, and his daughter and heire brought a writ of error in the kings bench, wherein two errors were assigned. 1. That before the exigent the 2 capias with a proclamation was awarded to the sheriffe of the county palatine of Durham, where it ought to have been directed to the chancelour of that county. ^k For that point 30 H. 6. 6. 36 H. 6. 35.

1 E. 4. 10. the book of entries Rast. fo. 52. Stanf. pl. cor. 68, 69. & 70. Vid. 19 H. 6. 2. 31 H. 6. 11. but the court gave no opinion concerning this error. The other error that was assigned, was that the sheriffe returned upon the said capias, that at his court holden at the city of Durham the eight day of July in the second and third yeares of the reigne of king Philip and queen Mary he made the proclamation, &c. and there were no such years: for queen Mary began her reigne the 6 day of July, and the 25 day of July in the 2 year of her reign she married king Philip: so as between the 2 day of July, and the 25 day of July, the queen wrote two years before the king. And therefore there could be no such years as 8 July anno 2 & 3, but should have been 2 & 4. And so was the clear opinion of the whole court. But then it was objected, that by the said act of 35 H. 8. and Stanfords opinion thereupon, that the attainder by outlawry being an attainder by the common law, it could not be reversed by writ of error, for that the said act of 35 H. 8. was to be intended of lawfull attainders: and after great deliberation the outlawry of treason was reversed. And I take it, it shall not be altogether impertinent, sure I am it shall not be unprofitable, to report the consequent of this reversall. In the next terme, sc. term. Hil. anno 27 Eliz. for that queen Eliz. had the lands whereof the said Ninian was seised in fee: his wife by petition of right, which comprehended the title of the wife, and the title of the queen, claimed her dower, which in effect was this: that her husband was seised of certain lands in fee, and took her to wife; and before his treason committed anno 1 *Marie* levied a fine with proclamation to another, whose estate the queen had by lawfull conveyance therein expressed; and that afterward her said husband was attainted of high treason by outlawry, *ut supra*, and died in anno 4 Eliz: which outlawry was the last terme reversed in a writ of error, as is above-said: which petition being indorsed by the queen, *Soit droit fait al partie*, and delivered into the chancery, Sir Thomas Bromley a man of great gravity and judgement in law, then being lord chancellor of England, by advice of all the judges resolved these four points following. First, that the petitioner need not to have any office to finde her title, because her title standeth with the title of the queen, and the queen is not intituled by office (which she might

^h Brit. ca. 122.
^a § Encusment
de crime.
Fleta, lib. 6. c.
6, 7. &c.

ⁱ Mic. 26 & 27
El. Ninian Mel-
vins case in the
kings bench
in bre. de errore.

^k See the stat. of
8 H. 6. cap. 10.

Hil. 27 Eliz. in
filaciis cancel-
lariæ.

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traverse,

Vide Lib. 2. fo. 93. Bingham's case. See the first part of the Institutes. sect. 55.

4 H. 7. cap. 24. the first saving.

^a 26 E. 3. 75.

4 H. 7. fo. 22.

& 11, 12.

38 H. 6. 4 &

12. 21 E. 4.

23. Dier 29

H. 8. fo. 32. pl.

8. idem.

6 Eliz. 228. pl.

45. 3 Eliz. fo.

188. pl. 8. a.

Lib. 8. fo. 42.

43. b. Dr.

Druryes case.

^b 34 H. 6. fo. 2.

* Nota.

^c 26 H. 8. cap.

13. 5 E. 6. cap.

11. These sta-

tutes not only

extend to all

treasons by the

statute of 25 E.

3. by the com-

mon law, but by

any other statute.

Vi. Dier 12.

Eliz. fo. 287.

accord. First

part of Insti-

tutes, sect. 479.

traverse, or confesse and avoid) but by conveyance, which she affirmeth. Secondly, that a fine with proclamations, and five years past after the death of the husband doth bar the wife of her dower, and that the conusee shall take advantage thereof, and of the attainder also. Thirdly, that albeit five years and many more in this case were past since the death of her husband, yet the said fine with proclamations did not bar her; because as long as the said attainder of treason stood in force, she was barred of her dower, and could not have any remedy, or pursue her title, untill the outlawry were reversed, and then her title of dower did first grow due unto her, and therefore she might within five years after the reversall of the said outlawry, pursue her title by the expresse words of the saving of the act of 4 H. 7. Fourthly, albeit an attainder reversed by a writ of error, is as concerning restitution to the party by relation from the beginning become of no force, ^a and the record so annihilated thereby, as *nul tiel record* may be pleaded thereunto: yet this relation shall never work a bar, and consequently a wrong to a stranger, but that the truth of the matter may be shewed, viz. the record, and the reversall of the same: and the rather (as some said) because the wife could not have any writ of error to reverse the outlawry, ^b so as she had no mean to pursue her right so long as the outlawry remained in force, which it did, untill it was reversed by error. But admit the wife had been (in a remote degree of consanguinity) heir to her husband, so as she might within five years after the death of her husband have had her writ of error after the death of her husband to reverse the outlawry, and to enable herselfe to pursue for her dower, and reverseth not the outlawry within the five years: I hold in this case that she shall have five years after this reversall, and that within the said saving of the statute of 4 H. 7. for then did her title of dower (as hath been said) first grow unto her, ^{*} and it was not in her power to reverse the outlawry when she would. And in this term of S. Hillary, Popham attorney generall, according to the said resolution of the lord chancellor and judges, confessed the petition to be true; and thereupon judgement was given, that she should be indowed, and was indowed accordingly.

^c By the statute of 26 H. 8. and 5 E. 6. it is enacted, that all proces of outlawry against any offenders in treason, being out of the realm, or beyond the seas, at the time of the outlawry pronounced, shall be as good and effectuell as if the offenders had been within the realme at the time of the outlawry pronounced. See the said statute of 5 E. 6. cap. 11. that, if the party outlawed shall within one year after the outlawry pronounced, yeild himselfe to the chief justice in England, and traverse the said indictment, &c. and thereupon be found not guilty by verdict, he shall be cleerly discharged of the said outlawry.

Judgement in case of Abjuration for Felony, whiles it was of Force.

After the flying of a felon for any kinde of felony whatsoever, sacriledge excepted, (but in case of high treason or petit treason a man could never abjure, because the coroner is not allowed by law

law to be a judge of those heynous crimes) into a church, &c. for safeguard of his life: and upon his prayer of a coroner ^a, * and his voluntary and particular confession of the felony before the coroner, naming the certain time, the judgement was, *Idem A. petiit de præfato coronatore regnum dom. regis Angliæ abjurare: super quo tradito^b ei libro p. præfat' coronatorē, idem A. regnum prædict. cora' præfato coronatore prædict' die, &c. in ecclesia prædicta abjuravit, in idem regnum nunquam rediturus absque speciali licentia, et reconciliatione regis Angliæ, et assignatus est eidem A. pro transitu suo extra regnum prædictum portus de Yarmouth^c cruce in manu sua dextra posita, prout lex Angliæ est et consuetudo.* Nothing is expressed in this judgement but *abjuravit regnum*, but therein is implied, that all his lands, which he had at the time of the felony committed, ^d (and therefore the time of the felony was set down in his confession particularly) or at any time after, escheated to the lords of the fees, and forfeited to the king all his goods which he had at the time of his attainder, ^e the time whereof also was expressed certainly, and his blood corrupted, and other incidents, as in other attainders of felony, only by his voluntary and particular confession. In this case for the offence of felony, he saved his life so long as he kept himself *extra regnum*, but if he returned, then under this word [*abjuravit*] is implied *sus. per solium*. Mich. 1 R. 2. rot. 1. Bedf. *rediit et suspend.* See the first part of the Institutes, sect. 200. fo. 132, 133. and the second part of the Institutes, W. 1. ca. 20. verbo, ^f *Fore jure le realm.* artic. Cler. cap. 10. and 15. And the law was so favourable for the preservation of sanctuary, that if the felon had been in prison for the felony, and before attainder or conviction, ^g had escaped and taken sanctuary in church or church-yard, &c. and the gaolers or others had pursued him, and brought him again to prison, upon his arraignment he might have pleaded the same, and should have been restored again to the sanctuary: see more concerning abjuration, Mic. 9 E. 3. coram rege rot. 84. *extra legem positus, &c.* To conclude this judgment of abjuration, we take it, that for felony ^h abjuration is utterly taken away. For abjuration of recusants and of hunters in parks, &c. we have given but a light touch, because they belong not to our treatise of the pleas of the crown, nor have we spoken any thing of abjuration in case of heresy, *quia spectat ad aliud forum*.

Thus have we spoken of judgments, and attainders in cases of high treason, upon verdict, confession, or *nihil dicit*, and by outlawry: in case of petit treason, upon verdict, confession, or by outlawry: and in case of felony, upon verdict, or confession, or by outlawry, or by abjuration; for none can be attainted of petit treason or felony upon a *nihil dicit*, or refusal to answer, but in that case the delinquent is to have his punishment of *peine fort et dure*, which next falleth to be handled.

rot. 115. Buck. William Attewels case. ^h For all sanctuaries are taken away by 21 Jac. ca. 28. Note a sanctuary in the statute of 1 H. 7. cap. is called a hidel or hydle, because it hideth and protecteth the party, &c. Vide Deut. cap. 19. 3. 9, 10. Numb. 35. 13. Joshua 20. 8. See 2. part of the Institutes, Gloc. ca.

^a 6 E. 3. 53. in Ajell Malloms case.

¹² E. 2. esche. 14. Tr. 21 E. 1.

coram rege 42. simile.

^b Hereupon it was called abjuration, because he was sworn to depart the kingdom.

See the Oath Vet. Mag. Cart. 1. pte. f. 167. 168.

^c That he might be known to be an abjured person, and not be let, or hindered in his journey. Et crux fuit signum servatæ vi-

tæ per ecclesiam, and is sometimes called vexillum sanctæ ecclesiæ. Hil. 26. E. 3.

coram rege rot. 20.

^d Pl. com. f. 262. a. in Dams Hales case. Register, fo. 164. b. Fecit feloniam pro qua regnum nostrum abjuravit.

^e Stanf. pl. cor. 117. E.

6 E. 3. 55. in Aiell Malloms case. 12 E. 2. Esch. 14. 6 E. 2. Forf. Br. 121.

6 H. 4. 6.

^f Forejure in French is taken for abjure, in Latin abjurare.

1 E. 3. 17. lib. intr. Rast. fo.

246. b. pl. 6. 11

8 Lib. int. Rast.

532. b. sanct. 2.

Hil. 43 E. 3.

ⁱ First part of the Instit. sect. 545. verb. attaint. 2 part of the Instit. W. 1. c. 12. Dier 3 El. 205. a. 13 El. 300. b. See before in the chap. of Treason. See after in the next chapter of Forfeiture fo. when the party arraigned challengeth peremptorily above the number of 36. viz. three whole juries.
^k 35 H. 6. 57. 58. Vide li. 9. fo. 124. the lord Zanchers case.

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Bracton. lib. 3. fo. 151. b.
 Britton. fo. 24. a. Fleta, li. 1. ca. 36. Bracton, lib. 3. fo. 104. b. maketh mention of punishment, verberibus et virgis.
 * 18 Aff. p. 13. 8 E. Cor. 130. 41 E. 3. Cor. 451.

Peyne fort et dure.

In case of petit treason or felony, ⁱ when the offender standeth mute, and refuseth to be tried by the common law of the land; See *Paine fort et dure* in the second part of the Institutes, W. 1. ca. 2. but this holdeth but in case of petit treason and felony. In case of high treason, upon standing mute, or a *nihil dicit*, the judgement aforesaid shall be given against him, as if he had been convicted.

And in doing of execution, both in treason and felony, two things are to be observed. First, that it be done by the right officer, as the sheriff, or marshall, for if any other execute the offender, it is felony. Secondly, execution must be made by him that is the right officer according to the judgement: for example, ^k where the judgement is, that the offender shall be hanged, he cannot behead him, &c. as before is said. Bracton, lib. 3. fo. 104. b. *Non alio modo puniatur quis, quam se habeat condemnatio.* P. 20 R. 2. coram rege rot. 58. Lincoln. *Non licet felonem pro feloniam decollari.*

Judgement in case of Petit Larceny.

The judgement herein was in ancient time referred to the discretion of the judge, as in Bractons time, *Per fustigationem, et sic castigatus dimittitur*. In Brittons time, sometime by the pillory, sometime by the losse of the ear: and Fleta saith, *Est enim furtum de re magna et parva, pro minimo tamen latrocinio 12 denariorum et infra, nullus morti condemnatur; pro hujusmodi modicis delictis inventa fuerunt judicialia pilloria, et deformitates corporum, ut scissio auricularum.*

* But in and since the reign of E. 3. no person lost any member for petit larceny, but were sometime punished by imprisonment, and sometime by other penance, as whipping, &c. If the delinquent flyeth for petit larceny, and so be found by the jury, he forfeiteth his goods.

Judgement in case of Misprision of High Treason.

That the offender by the common law shall for this concealment forfeit all his goods; and the profits of his lands during his life, and suffer imprisonment during his life. Vide Stanford pl. coron. fo. 38. 1 et 2 Mar. cap. 10.

Judgement for striking in Westminster Hall, &c. sitting the Courts.

That the offender shall be imprisoned during his life, forfeit all his lands, tenements, goods and chattels, *et quod manus sua dextra amputaretur (apud talem locum)* and this judgement is given by the common law. Bracton, lib. 3. 104. b. *Pœnarum quedam adimunt membrum, et corporis coercionem, sc. imprisonamentum, vel ad tempus, vel imperpetuum.*

Judgement

Tr. 4 E. 4. coram rege rot. 3. 19 E. 3. Judgement. 174. 39 Aff. p. 1. 41 Aff. 25. 22 E. 3. 13. a. 41 E. 3. coron. 280. 42 Aff. 18. Stanf. pl. cor. 38. c. 3 Eliz. Dier 188.

Judgement for Striking and drawing Blood in the Kings Court, &c.

The offender shall have his right hand stricken off, be imprisoned during his life, and be fined and ransomed at the kings will: and this judgement is given by the statute of 33 H. 8. cap. 12. 33 H. 8. Paine Br. 16.

We cannot omit to touch by the way an act made in 1 & 2 Ph. and Mar. intituled, an act against seditious words and rumours, by a branch of which act, he that should send forth any booke, ryme, ballad, letter or writing containing any false, matter, clause or sentence of slander or reproach, and dishonour of the king and queens majesty, or either of them, &c. should have his or their right hand stricken off; which act being but a probationer, at the parliament in 4 & 5 Ph. and Mar. was continued untill the end of the next parliament. And by the act of 1 Eliz. (which was the next parliament) the said act of 1 & 2 Ph. and Mar. was enacted to extend to queen Elizabeth, and to the heirs of her body kings and queens of this realm, so as by the demise of queen Eliz. that act hath lost his force, as it was well worthy, being a dangerous act as some had felt in anno 23 Eliz.

1 & 2 Ph. and Ma. ca. 3. obtruncatio manus dextræ.

1 El. c. 6.

Judgement in a Premunire at the Suit of the King.]

If the defendant be in prison, *Quod prædictus R. sit extra protectionem domini regis, et terras, et tenementa, bona et catalla domino regi forisfaciat, et quod corpus ejus remaneat in prisona ad voluntatem regis,* as in the book of entries, Rast. Judgement 465. And this judgement is given by the statutes of 25 E. 3. ca. 22. 25 E. 3. de Provisoribus. 27 E. 3. ca. 1. 16 R. 2. ca. 5. and if he be not in prison, *Quod præd. R. sit extra protectionem domini regis, et terras et tenementa, bona et catalla domino regi forisfaciat, et quod capiatur.*

See the 1. pt. of the Instit. §. 159.

44 E. 3. 36.

Judgement in case of Theftbote.

That the offender be fined: and it is to be observed that whenever the delinquent, or defendant is to be fined, the judgement is *quod capiatur*, that is, to be imprisoned untill he doth pay his fine: but when the defendant is to be amerced, and not fined, then the defendant is *in misericordia*, whereof you may read at large. Lib. 8. fo. 38, 39. &c. et 59, 60. et 120. lib. 11. 43, 44.

51 E. 3 Cor. 353.
29 E. 3. 9.
27 Aff. 69.
42 Aff. pl. 5.
Stanf. fo. 40. b.

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Pillory.

Pillory is a French word, and it is derived of the French word *pilastre* a pillar, *columna*. *Et est lignea columna, in qua collum insertum premitur,* and thereupon in law it is called *collistrigium*, *quia in eo collum hominum constringitur*: this punishment is very ancient, for the Saxons called it *healsfang*, so called for straining the neck. Britton, fo. 24. saith, that those that have been adjudged to the pillory, or tumbrell, are so infamous, *Come ilz ne sont*
III. INST. S receiv-

Saxonicè *healsfang*. Or *balsfang*, *bals collum, fang pressio*. It is also called an amercia-ment for commutation of such a punishment. 51 H. 3. Judicium collistrigii. Et pillorii,

Vet. N. B. 1. *receivables al serement faire in juries, enquests ou en testmoignants ;*
 parte. 116, 117. and herewith agreeth Bracton. Vet. Mag. Cart. 2. parte, fo. 23,
 Britton, fo. 24. 24. 45.
 Mirror, cap. 4.
 §. De paines en
 divers maners. Kelway temps E. 3. 145. b. Fleta, li. 2. cap. 8. By the statute of 31 H. 3. &
 31 E. 1. Vet. Mag. Cart. 2. parte, fo. 23, 24. 45.

Bracton, lib. 3.
 fo. 104. b. 129.
 b. 151. b. 138.
 Mirror ubi supra.
 Temps E. 3. Kel-
 way 139, 140. b.
 149. b. 152.
 Fleta li. 2. ca. 11.
 §. Item si d'nus
 li. Intr. Rast.
 494. a. in Quo
 warr. 7 E. 2. in
 eodem 260. b.

Tumbrell.

Tumbrell is a word in use at this day for a dungcart. Bracton calleth it *tymboralem*.

Infligitur pœna corporalis, sc. pilloralis vel tumberalis cum infamia. Secundum regni statuta, it is called tumberellum, there being no proper Latin word for a dungcart.

Furce pillor et tumbrel append al view de franckpledge And every one that hath a leet or market ought to have a pillory and tumbrell, &c. to punish offenders, as brewers, bakers, fore-stallers, &c.

Trebuchet.

Stat. de 51 H. 3.
 ubi supra.
 Vet. Mag. Cart.
 part 2. fol. 44,
 45. stat. de pare
 & cervisia.

Or castigatory, named in the statute of 51 H. 3. signifieth a cucking stool, and trebuchet properly is a pitfall or downfall, and in law signifieth a stool, that falleth down into a pit of water, for the punishment of the party in it. And *cuck*, or *guck* in the Saxon tongue, signifieth to scould or brawl, (taken from the cuckhaw, or guckhaw, a bird, *qui odiose jurgat et rixatur*) and *inge* in that language [water] because she was for her punishment sowed in the water, and others fetch it from cuckquean, i. *pellex*.

Now for that the judgement to the pillory or tumbrell (as it hath appeared before) doth make the delinquent infamous, and that the rule of law is, *Judicium de majore pœna quam quod legibus statutum est non infamum facit, sed per breve de errore adnullare potest*, and again, *pœna gravior ultra legem posita æstimationem conservat*, that the justices of assise, oier and terminer, gaol-delivery, and justices of peace, would be well advised before they give judgment of any person to the pillory or tumbrell, unlesse they have good warrant for their judgment therein. Fine and imprisonment for offences finable by the justices abovesaid, is a fair and sure way.

And it is to be observed that those kinds of punishments of pillory, &c. have been given by acts of parliament in cases of enormous and exorbitant offences, as by the statutes of 51 H. 3. 31 E. 1. De pistoribus, &c. 31 E. 1. De forestallariis. 11 H. 7. ca. 4. 33 H. 8. ca. 1. 1 & 2 Ph. and Mar. cap. 10. 2 E. 6. ca. 15. 5 E. 6. ca. 6. & 14. 7 E. 6. ca. 7. 1 El. c. 7. 5 El. ca. 9. 16. 18 El. cap. And therefore the safest way for them is to follow those acts of parliament in cases provided by the same: but of the court of the kings bench, (the highest court of ordinary justice) in respect of the multitude of the judicial presidents (which we have seen) we say with the poet. *Huic nec metas rerum, nec tempora pone*, (for judicall presidents of grave and reverend judges, are good

• Vet. Mag.
 Cart. parte 2.
 fo. 24, 25.

Judgements to
 be given by jus-
 tices of assise, of
 oier and ter-
 miner, of gaol-
 delivery, of jus-
 tices of peace.

good guides to direct men in the right way) we will enumerate some of them.

21 E. 1. coram reg. rot. 2. Eustachius de Porles Castel, for slandering of justice Berisford, imprisonment in the tower, *ad voluntatem regis*.

Exemplary punishments adjudged in the kings bench.

Mich. 33. E. 1. coram rege. Rot. 75. William Brewces case, for slandering, &c. of Roger Hegham justice. Tr. 3 E. 2. int. mem. scaccarii for slandering of Foxley, a baron of the exchequer. Mich. 18 E. 3. coram rege, Rot. 151. for slandering of the justices of the kings bench, by a letter of Tho. Bulbroke a clerk of the same court. 30 Ass. p. 5. 19. 19 Ass. 1. Pasch. 10 E. 3. Rot. 87. *Thom. Twice Hazarder cois' ludens ad falsos talos adjudicatur quod per sex dies in diversis locis ponatur super collistrigium*. Mich. 10 E. 3. Rot. 92. coram rege, Adam de Ravensworth. Mich. 21 E. 3. coram rege, Warw. Vers. Attornat' apparent' sine warranto. Hil. 25 E. 3. coram rege, Rot. 13. *versus Robert. Hadham commissarium pro venditione bladi in garbis adjudicatur prisonæ, et quod ab omni officio domini regis amoveatur et finem faciat*. Tr. 2. H. 4. coram rege, Rot. 10. Suffex. Mich. 4 & 5 Eliz. coram rege, Hugh Bakers case, for a libell against certain of the inhabitants of Chersie, punished by imprisonment, pillory, and good behaviour, &c.

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See the fourth part of the Institutes, cap. Star-Chamber, for punishment by pillory, &c. for enormous and exorbitant offences, which require more exemplary punishment then an ordinary course of the laws of the realm do inflict. *Nobiles magis plectuntur pecunia, plebei vero in corpore*; which is observable in all the said statutes. And Bracton saith, *Quælibet pœna corporalis, quanvis minima, major est quælibet pœna pecuniaria. Carcer ad continendos, non ad puniendos haberi debet, &c. Pœnæ potius molliendæ, quam exasperandæ sunt. Respiciendum est judicanti, ne quid aut durius, aut remissius constituatur, quam causa deposcit; nec enim aut severitatis, aut clementiæ gloria affectanda est. Aliter puniuntur ex eisdem factionibus servi, quam liberi: et aliter qui quidem aliquid in dominum, parentemve commiserit, quam in extraneum; in magistratum, quam in privatum*.

Ancient rules of law in corporall punishments. Bracton, lib. 3. fo. 105. 2. Ibid.

Ibid.

Death of a man per infortunium.

Of this mischance there is no expresse judgement to be given, but the offender is to sue out his pardon of course, as it appeareth in the second part of the Institutes, Gloc. cap. 9. And hereof Bracton saith, *Casu, cum per infortunium, ut si aliquis venando per telum in feram missum, hominem interfecerit, et similia perpetraverit, &c.* But albeit there be no expresse judgement given upon such a verdict, yet the law giveth a judgement thereupon, viz. that he shall forfeit all his goods and chattels, debts and duties whatsoever, as in the second part of the Institutes, *ubi supra*, it appeareth.

Marlbr. cap. 25.

Bracton ubi sup.

Judgement implied, or in law. 24 H. 8. cap. 5.

Of Death of a Man, se defendendo.

Upon such a verdict given the court giveth no expresse judgement, for he is also to be pardoned of course: but the law hath given a judgement, that he shall forfeit all his goods and chattels, debts and duties, as in the second part of the Institutes, *ubi supra*, it appeareth.

Judgement implied, or in law. See ca. 7 fo. 95. b. 43. Ass. p. 31. Rot. parl. 3 R. 2. nu. 18. John Imperials case.

appeareth. But the jury cannot finde that the party killed him generally *se defendendo*: but they ought to finde the case specially, so as the court may judge whether in law it be *se defendendo*, or no. See Stanf. fol. 15.

Of the Death of a Man that offereth to rob, &c.

^a 3 E. 3. cor. 305.

^b 3 E. 3. cor. 330.

26 Aff. 23.

Exod. 22. Si effringens vir domum five suffodiens fuerit inventus, & accepto vulnere mortuus fuerit, percussor non erit reus sanguinis.

^c Nota, declared, &c. and so was the common law, as by the books aforesaid it appeareth.

22 Aff. p. 55.

22 E. 3. cor. 261.

3 E. 3. cor. 328.

3 E. 3. ibid. 288.

289, 290.

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* See in the cha. of Hue and Cry.

^a Rot. pat.

3 H. 4. part. 2. Duellum percussum.

13 H. 4. 4.

37 H. 6. 20, 21.

See before in the chapter of Approver. Fleta,

lib. 1. ca. 32.

^b 4 E. 3. 41.

30 E. 3. 20.

29 E. 3. 12.

13 Eliz. Dier,

301. Mirror, cap.

3. § Combat, &

§ Juramentum

duelli, & § Or-

dinatio pugnan-

tium.

If it be found by verdict, that the party (indicted or appealed for the death of A) A attempted to have murdered or ^a robbed him in or nigh any common high way, cart-way, horse-way, or foot-way, or in his ^b mansion or dwelling house; or for the killing of him which attempteth burglary to break his dwelling house in the night; the judgement upon such a verdict shall be, that he shall be acquitted of the death of such a person paying his fees, and he shall forfeit nothing. And so it is ^c declared and enacted by the statute of 24 H. 8.

And if all the circumstances be proved to the jury in evidence required by this act in these cases, the jury may finde a generall verdict of not guilty. And where it is rehearsed in the said act of 24 H. 8. that before that act it was a question and ambiguity whether evill disposed persons so attempting, *ut supra*, should forfeit their goods and chattels: the reason of that question and ambiguity was in none * of those cases mentioned in that act, no robbery, murder, or burglary was done, but an attempt only to do it. But it was no question at the common law, that if a robbery, murder, burglary, or other felony was done, and pursuit made after the offender, who either by resistance or flight could not be apprehended without killing of him by inevitable necessity, the party so pursuing and killing should not forfeit his goods or chattels; for in those cases every man may arrest the felon by a warrant in law. But there is a diversity between a warrant in deed, and a warrant in law, in this, that if a man be indicted of murder, robbery, burglary, or other felony, and the sheriffe by vertue of a *capias* offer to arrest him, and he resisteth and flye, *ut supra*, the sheriffe may kill him, if otherwise he cannot arrest him, although in truth the party be not guilty, nor any felony done. But in the case of the abovesaid warrant in law, there must be a felony done, and this diversity appeareth in our books. * And so it is, if after arrest for felony the party arrested resisteth or flyeth, and in pursuit is slaine by inevitable necessity, they so killing him forfeit nothing.

An approver that kils the party accused in battell, or a champion that killeth the other champion in a writ of right, or the plaintife or defendant in an appeale that killeth the other *in duello*, according to the common law, or in combat awarded by the ^a constable and marshall in the court of chivalry, the party killing shall forfeit nothing; for these combats or duels are such trials as the law appoints in such cases. For saith Fleta, *Duellum est singularis pugna inter duos ad probandum veritatem litis; et qui vicerit probasse intelligitur: et quamvis judicium Dei expectatur ibid. quicunque tamen monomachiam, i. singularem pugnam sponte susceperit, aut obtulerit, homicida est, et mortale contrahit peccatum.* But before we leave these champions, it is to be observed that whosoever taketh upon him to be a champion for another (the forme and ^b oath whereof you may reade in the second part of the Institutes, W. 1. cap. 40. and

Glinvil.

Glanvil. lib. 2. cap. 3.) if he become recreant, that is, a crying coward or craven, he shall for his perjury ^c lose *liberam legem*.
^d Craven is derived from the Greek word *κράων*, à *vociferatione*: others nearer home, of crying and craving of mercy and forgiveness. And *recreantia* is derived of the French word *recreance*, of giving back or cowardize. And sometime it is called *creantia* ^e *per antiphrasin*, because he that useth it is not faithfull, but breaketh his oath. And so if the appellant joyne battell, and cry craven, he shall also lose *liberam legem* for the cause aforesaid, but if the appellee cry craven he shall be hanged: * but if they combat untill night come, and starres appear, the defendant in the appeal goeth quit, and the plaintife in that case loseth not *liberam legem*.
^f *Amittere liberam legem* is to become infamous and of no credit, never to be witnesse, or juror: for when he is of fame and credit, he is called *liber et legalis homo*: and such men ought to be of juries and witnesses, because they do enjoy *liberam legem*.
^g And a champion ought to be *liber homo*, and so is the entry, *per corpus liberi hominis. Et quam infamiam victus incurrit*, see Glanville, lib. 2. cap. 3. & lib. 14. cap. 1. And he further saith, *Talis debet campio petentis esse, qui sit, et esse possit inde testis idoneus*. So as no man by the ancient common law could be a champion, but he that knew the right, and was a witnesse thereof: and therewith agreeth the statute of W. 1. cap. 40. wherein observe what the oath was by the common law. *Aliquando patria stat pro campione et aliquando in bre. de recto campio stat pro patria*.
Campio is derived à *campo*, because it is publickly stroken in the field, and is called camp-fight: and is taken in the common law for one that striketh a legal camp-fight or combat in another mans quarrel: in Latin he is called * *pugil à pugna*. But the defendant in an appeal that is to combat, is not called a champion, because he fighteth for himselfe. And these combats in cases whereof the conuance belongs to the common law, are to be directed by the judges of the common law *secundum legem et consuetudinem Angliæ*, and not by the constable and marshall by the civill law, as all our ancient authors and bookes abovesaid do agree, which also is apparant by the statute of 13 R. 2. ca. 2.

lib. 3. fo. 141. b. Britton, fo. 42. Fleta, lib. 1. ca. 32. Glanvil, lib. 2. c. 3. lib. 9. cap. 1. Et lib. 14. ca. 1. 9 H. 4. 3. 17 ass. 3. 17 E. 3. 2. 9 E. 4. 25. Fleta ubi sup. lib. Int. Co. fo. 182. 55 H. 3. ubi sup.

^c Judgement in law against a recreant and craven champion is, *perdere liberam legem*.

See a notable record hereof R. pa. 55 H. 3. m. 3. Glanvil, li. 2. ca. 3. lib. 14. cap. 1. ^d Mirror cap. 3. ^e Ordinatio pugnantium, L'horrible mote de craven.

^e 41 E. 3. cor. 98.

creant for recreant.

Bract, lib. 3. f.

141. Brit. fo.

42. 81. Fleta

lib. 1. ca. 32.

19 H. 6. fo. 35.

21 H. 6. 34.

* Mir. c. 3.

§. ubi su.

^f Glanvil, lib. 2.

cap. 19. *Legem*

terræ amittentes

perpetuam infamiz

notam inde

merito incur-

runt.

See the first part

of the Int. Sect.

514. 27 Ass. 59.

liberam legem,

qui, &c.

^g 1 H. 6. 6.

3 H. 6. 55.

See the oath in

appeal, Bracton,

Judgement in an Indictment of Conspiracie, &c. where the Party [222]
indicted is legitimo modo acquietatus.

Nota, the judgement in this case is, as in case of attaint against a jury, (whereof we shall speak hereafter), viz. *Quod committantur gaule domini regis, et quod omnia terræ et tenementa præd. R. & C. capiantur in manum domini regis, et devastentur, et extirpentur, et uxores et liberi eorum amoveantur, et omnia bona et catalla eorundem R. & C. forisfaciant domino regi, et amodo amittant liberam legem imperpetuum.*

Nota in this judgement five severe punishments. 1. That their bodies shall be imprisoned in the common gaole. 2. Their wives and children amoved out of their house. 3. That all their houses

4 H. 5. Indict.

220. Tr. 18 E. 3.

coram rege Rot.

148. Walt judi-

cium reddit.

contr. Conspira-

tores. Pasch.

32 E. 3. Rot.

58 Somersf.

27 Ass. 59.

24 E. 3. 34.

43 E. 3. 33. b.

Vid. Artic. super

cart. cap. 10.

and lands shall be seised into the kings hands, and the houses wasted and the trees extirpated. 4. All their goods and chattels forfeited to the king. 5. That they for ever shall lose the freedome and franchise of the law. That is, first, they shall never be of any jury or recognitors of assise. Secondly, nor ever be received for a witnesse in any case. Thirdly, that they shall never come into any of the kings courts, but make attornies, if they have any thing to do there. And this is called a * villanous judgement, because of the villany and infamy which they deserve against whom it is given: And all is inflicted by the common law, for that the offenders by false conspiracy under the pretext of law, by indictment of treason or felony and legall proceeding thereupon, fought to do the greatest injustice by false conspiracy to shed his blood, who afterwards is thereof *legitimo modo acquietatus*.

But in a writ of conspiracy at the suit of the party grieved, the judgement is, damages to the party, fine to the king, and imprisonment. And the reason thereof is, first, for that when they are indicted at the suit of the king, the judgement is so severe, for that they falsely conspired in the kings name, and at the kings suit by indictment, &c. to do so horrible injustice: therefore at the kings suit they shall be heavily punished. Secondly, for that as it is said in 15 E. 2. *De exilio Hugonis, &c.* the law which was instituted for the maintenance of peace and of good men, and the punishment of the evill, is turned to the disheritance of the great men, and destruction of the people. Thirdly, for that the judgement at the kings suit is by the common law, and the action of the party is given by statute, which giveth no such punishment: but the party in his action, in respect of the danger of his life, is to recover answerable damages. Of conspiracy see the Register, fol. 134. a & b. & 188. F. N. B. 114, 115, &c. Stanf. pl. cor. fol. 172, 173, 174, 175, &c. and in the new Book of Entries, fol. 109. a president of a conspiracy upon an indictment of felony.

It is enacted, that such as be attainted of confederacy or conspiracy, shall have no office of the grant of the king, queen, or other noble, neither shall be sheriffe or escheator,

Judgement in an Attaint.

1. That the plaintife shall be restored, &c. and the defendant party to the record shall be fined in respect the false verdict was given for him (*cui bono*) by the common law.

The judgement against the petit jury is, as it is in case of conspiracy at the suit of the king, as is abovesaid, and in no other, but in those two cases, that villainous judgement is given. See 8 E. 2. Aff. 396. and 42 E. 3. 26. b. judgements given in attaint, *et nota bene*. 16 E. 3. tit. Judgement, 109. 21 H. 7. 83. Kelway. a good president of a judgement given in an attaint. Fortescue, cap. 26. Concerning Attaints, see the second part of the Institutes, Marlbr. cap. 14. W. 1. cap. 37, &c.

coram Hen. de Guildeford & aliis just. assignatis an. 35 E. 1. attincta. See the Institutes, sect. 514. verb. [en attaint.] Vide Mich. 3 H. 4. Rot. 149. Judgement

* 24 E. 3. fo. 33.
27 Aff. 53.

4 H. 5. judg.
220. 24 E. 3.
34. 27 Aff. 59.

43 E. 3. 33. b.
Tr. 32 E. 1. Rot.
15 Eborum.

Parl. 17 E. 3.
nu. 50.

Lib. Intr. Rastal.
fo. 92. a.
9 E. 4. 51.
4 H. 5. ubi sup.
15 Aff. 2. Kel-
way 130. b.
Glanvil. lib. 2.
cap. 19.
Bracton, lib. 4.
fo. 129.
Brit. fo. 237,
238. Mirror,
ca. 3. § de attaint.
Flet. lib. 5.
ca. 21. Apud.
Northalverton
in com. Eborum
first part of the
en attaint. Kanc.

But

But now by the statute of 23 H. 8. cap. 3. the severity of the punishment is moderated, * if the writ of attainr be grounded upon that statute: but the party grieved may at his election either bring his writ of attainr at the common law, or upon that statute: but all attainrs, either at the common law or upon the statute are to be taken before the king in his bench, or before the justices of the common pleas, and in no other courts.

This act of 23 H. 8. provideth for divers mischiefs which were at the common law, and giveth to those of the petty jury divers pleas, which they could not have at the common law, and hath been well expounded. 7 E. 6. Dier, 81. b. Sir John Ailifs case. 3 & 4 Ph. and Mar. 129. b. Heydons case. 3 Eliz. 201. Clovils case. 3 Eliz. 202. Austens case. 7 Eliz. 23. b. Stephens case. See the record thereof upon the statute of 23 H. 8. for it is an excellent president.

And generally of attainrs, see Lib. fo. 111. 112. Lib. 3. fo. 4. Lib. 6. fo. 4. 14. 25. 26. 44. 80. Lib. 8. fo. 60. Lib. 9. fo. 12. Lib. 10. fo. 119. Lib. 11. fo. 6. 43. 62. See also the new book of Entries, 63. 66. 68. 70. 73. 76. 77. 81. 83. 85. 86, &c.

Judicium de corrupto Judice.

We could not passe over a strange judgement of *suspendatur*, &c. as in case of felony (which we have touched before in the chapter of Bribery given against Sir William Thorpe, lately before chief justice of England, which we finde of record in these words. *Processus factus an. 24 E. 3. contra Willielmum Thorp chivalier nuper capitalem justiciarium coram Rico. comite Arundel. T. de Bellocampo comite Warw. Willielmo de Clinton comite de Hunt. Joh. de Gray de Rothersfield seneschallo hospitii regis, et Barthol. de Burgers. camerar. regis: pro eo quod idem Willielmus Thorp nuper capitalis justiciarius domini regis ad placita coram ipso rege tenenda, dum stetit in officio, cepit munera contra juramentum suum, viz. de Ricard Saltley 10 li. de Hildebrando Boreward 20 li. de Guillerto Hollyland 40 li. de Tho. Darby Sancti Botulphi, et de Roberto Dalderby 10 li. qui pro diversis felonis, falsitatibus, et transgressionibus coram ipso Willielmo in cessione sua apud Lincolne anno 23 fuerint indictati, et per ipsum Willielmum bre. de exigendo vers. eos respect' fuit: quæ omnia et singula dedicere non potuit: ideo adjudicatum fuit prout sequitur, viz. Consideratum est per dictos justiciarios assignatos ad judicandum^a secundum voluntatem domini regis, et secundum regale posse suum, quod quia prædictus Willielmus de Thorpe qui sacramentum domini regis quod erga populum habuit custodiendum fregit^b maliciose, false, et rebelliter in quantum in ipso fuit, et ex causis supradictis per ipsum Willielmum, ut prædictum est, expresse cognitis, suspendatur. Et quod omnia^c terræ et tenementa, bona et catalla sua domino regi remaneant forisfacta. Et postea dominus rex mandavit bre. suum sub privato sigillo, all in French, and there entred de verbo in verbum. Ideo consideratum est quod executio judicii prædicti de suspensione ejusdem Willielmi omnino cesset et ei pardonetur. Et quod idem Willielmus remittatur prisonæ turris prædictæ ad gratiam domini regis expectandam, &c. Et non est intentio domini regis quod hujusmodi judicium in consimili casu versus quemcunque alium ex quacunque causa se*

Rot. pat. anno
24 E. 3. part 3.
m. 2. in dorf. &
Rot. pat. anno
25 E. 3. part 1.
m. 17.

In toto 80 li.

^a The effect of the words of the oath hereafter mentioned.

^b Nota, here is neither felony, nor præditive in this indictment, but rebelliter.

^c According to the said oath, for otherwise the king had no colour to have the forfeiture of all his lands for felony, but every lord of whom they were respectively holden, &c.

^d Nota prædictum sacramentum.

^e Rot. Parl. in Oct. Pur. an. 25 E. 3. nu. 10.

teneat vel extendat, sed solummodo versus eos qui prædictum^d sacramentum fecerunt, et fecerunt, et fregerunt et habent leges regales Angliæ ad custodiend^o.

^e We have also found, that at a parliament holden at Westminster in *oëtabis purificationis beatæ Mariæ*, anno 25 E. 3. holden before Lionel duke of Clarence by force of the kings commission, &c. commandement was given, that the record of the said judgement against the said Sir William Thorp should be brought into the parliament, and there to be openly read before the nobles of the parliament to hear every of their advices, which was done accordingly, and there the nobles affirmed the judgement.

And these words in the said judgement, *Ad judicandum secundum voluntatem domini regis, et secundum regale posse suum*, and that his lands should be forfeit to the king, *et prædict. sacramentum*, were grounded upon the oath of the kings justices in anno 18 E. 3. the conclusion of which oath is, [upon pain to be at the kings will, body, lands, and goods, thereof to be done as pleaseth him.] We desirous to satisfie our self herein, searched for the record of this oath, and albeit there is a parliament roll of this parliament, and other acts, then passed by authority of parliament, be entred into the said roll, yet this is not; for that it had not the warrant of an act of parliament. It ought to have been printed amongst the statutes of the realm, and the title of them is, Here followeth the oath of the justices made in the same eighteenth year, but faith not at the parliament, &c. but after it became to be printed: and that which is printed in anno 20 E. 3. ca. 1. is but a recitall made by the king alone, and no act of parliament: for it appeareth by that which precedeth, and by the oath it self, that it was the act only and commandement of the king, for it beginneth: first, we have commanded all our justices, &c. which former part was but a recitall of some precedent act: and then followeth, we have ordained and caused our said justices to be sworn, &c. so as the oath was devised by the king, and the justices sworn before this parliament. Lastly, it is there said and concludeth: and for this cause we have encreased the fees of our said justices, &c. which the king of himself did before this act also.

And we have an ancient manuscript of the acts of parliament in ann. 18 E. 3. and the oath is not within it.

Fleta, li. 1. ca. 17. § Cum igitur non sit, &c.

Vet. Mag. Cart. 1. parte fo. 165. Vide Bract. li. 3. fo. 109. Sacrament^o Justic^o itiner^o and that then was the effect, de sacrament^o Justic^o residentium. Vid. Flet. 1. 2. c. 7. § Item atrox est injuria, &c.

And it appeareth by Fleta, that the punishment of a corrupt judge, that receiveth gift or reward was, *Si inde convictus fuerit, quæd imperpetuum à concilio regis excludatur; terrasque, res, redditus, et proventus bonorum suorum amittat per unum annum: qui, si proventus non habuerit, puniatur per discretionem regni et consiliariorum regis.* And that which Fleta calleth *sacramentum justic^o*, in Vet. Magna Carta, is named, *juramentum consiliariorum regis*: for the judges of England are of the kings counsell (as elsewhere hath appeared) for, in, and concerning the laws of the realm, in which oath also the said fatall clause is omitted.

See the Mirror cap. 4. §. *de faux judges*, and ca. 5. §. 1. of the law in the time of king Alfred, how many justices were in one year hanged, as homicides, for their false judgements: but that law hath been long since delect and antiquated, and yet may serve for a memoriall of the time past.

The offence of bribery was punished by fine, and ransome, and losse

losse in the reign of E. 1. as in the chapter of Extortion and Bribery before appears: only Sir Thomas Weyland chief justice of the common pleas, took sanctuary, and before a coroner confessed himself guilty of murder, and according to the course of the common law abjured the realm, so as indeed he was attainted of felony, (which case had been vehemently urged) but it was not for bribery, but for murder, as any other man might have been.

But to wind up the thred of this discourse with three acts of parliament. First, with the statute of 8 R. 2. wherein it is recited, that whereas in the time of king E. 3. it was ordained, that justices as long as they should be in office, should not take gift or reward, and so forth, as in Veteri Magna Carta (without the said fatall clause) that act provideth, that the oath without that fatall clause should extend as well to the barons of the exchequer, as to the justices, and expressed the penalty of all to be (according to the common law) viz. losse of office, fine and rancome. But at the next parliament, viz. 9 R. 2. the said act of 8 R. 2. for that it was ^a very hard, and needed declaration, was made of no force till it be declared in parliament. ^b Afterwards at the parliament holden 11 H. 4. it was debated what punishment great officers there named counsellors of the king, and judges, &c. should have, which should take any gift, reward, or brocage for doing of their offices or services: in the end it was declared and enacted by authority of parliament, in these words following. *Item que nul chancelor, treasurer, garden del privy seal, counsellier du roy servientes a counsell du roy, ne nul autre officer, * juge ne minister du roy pernent fees ou gages de roy pur lour dites offices ou service, preigne en nul manner, en temps avenir ascun manner de ^c done ou brocage de nulluy pur lour ditz offices et services affaire, sur peine de 1 responder a roy de la treble de ceo, que [†] issi preignent, 2 et de satisfaire la party, 3 et punis al volunt le roy, et 4 soit discharges de son office, service, et counsell pur tous jours, et que chescun que verra pursuer en la dit matier eit la sute sibien pur le roy come pur luy mesme, et eit la tierce part del summe de que la partie soit duement convict. Responf. Le roy le voet.*

^a This act being by authority of parliament, hath limited the punishment (amongst others) of corrupt judges, of whom now we entreat, so as the former example of Sir William Thorp is not now to be followed, which we affirm not in favour of fordid bribery, (which we hate, as in the proper chapter thereof before appeareth) but in advancement of justice and right, which is the end of our labour in this and other of our works; ^b and therefore have caused that good act that hath lived so long in obscurity, for the better notice and observation thereof, to be put to the presse, which never was yet printed; and the cause thereof was, for that in the margin of the parliament roll of this act, it is written, *respectuatur per dominum principem et concilium*: a strange presumption without warrant of the king his father, and of the parliament, to cause such a *respectuatur* to be made to an act of parliament.

The like he did to another act in the same parliament, nu. 63. concerning attorneys, the like whereof was never done in any former or latter parliaments. * This was that prince Henry, who keeping ill company, and led by ill counsell, about this time assaulted (some say) and stroke Gascoign chief justice sitting in the kings bench, for that the prince endeavouring with strong hand to rescue

8 R. 2. ca. 3.
Vide Vet. Mag.
Cart. fo. 165. a.
ubi supra.

9 R. 2. cap. 1.
^a In respect of
the recitall.

^b Ro. Par.

11 H. 4. nu. 28.
not heretofore
printed. Vid.

1 H. 4. nu. 99.
* Nota.

^c This is agreeable to the law of God, Deut. 16. 19. Non accipies personam, nec munera, quia munera excæcant oculos sapientum, et mutant verba justorum.

Exodus 23. 8.

† [225]
Nota four punishments.

1. By the court of justice where the matter shall depend (as hath been often observed) by fine and imprisonment.

^a In the oath of the justices in Wales, that fearful clause is omitted, neither is it in the oath of the barons of the exchequer of England.

^b Veritas nihil veretur nisi abscondi.

* See Sir Tho. Eliot in his Governour, &c. Holl. Chron. 543. a.

rescue a prisoner, one of his unthrifty minions indicted and arraigned at the kings bench bar for felony, was prevented of his purpose by the perswasion and commandement of the chief justice, for which the chief justice committed the prince to the kings bench, whereof some of his followers instantly complained to the king his father: who informing himself of the true state of the case, gave God infinite thanks, that he had given him such a judge, as feared not to minister justice, and such a son, as could suffer seemblably and obey justice. And this is that prince, who abandoning his former company and counsell, and following the advice of grave, wise, and expert men, whom he made choice of to be of his counsel, became a victorious and vertuous king, and prosperous in all that he took in hand, at home and abroad.

For the duty of judges, it is truly said (as before hath been said) that *judex debet habere duos sales, viz. salem scientie, ne sit insipidus, et salem conscientie, ne sit diabolus*. And what persons should be judges, see Bracton, lib. 1. cap. 2. & lib. 3. fo. 106. & Fleta, lib. 1. cap. 17. § Caveat, and the Mirror, ca. 2. §. 2. de judges, and Rot. Parl. 17 E. 3. nu. 3. 10.

Anno 1 Mar.
stat. 2. ca. 2. in
print. See the
Articles of Con-
cord, 21 Maii
anno Dom. 1420.
et anno 8 H. 5.
between king
H. 5. and Charles
the French king,
whereby the
crown of France
after the death
of the said
Charles, was
established to
H. 5. and his
heirs. Artic. 7,
8, &c.

To these we will add, that upon the conclusion of a marriage then to be had between Philip the son of the emperor, and prince of Spain, it was nobly and wisely provided by the queen, the lords spirituall and temporall, and the commons by authority of parliament (amongst many other excellent provisions worthy of observation) that the said prince should not promote, admit, or receive to any office, administration or benefice in the realm of England, and the dominions thereunto belonging, any stranger, or persons not born under the dominion and subjection of the most noble queen of England: and that the said most noble prince should doe nothing whereby any thing might be innovated in the state or right, either publique or private, or in the lawes and customes of England, or the dominions thereunto belonging, but shall contrariwise confirm and keep, to all estates and orders, their rights and priviledges.

And it is there further provided for the future, &c. that if the said prince should have issue male or female, the order of succession is there declared, but with this proviso. Provided neverthelesse, and expressly reserved in all and singular the above declared cases of succession, that whatsoever he or she be, that shall succeed in them, they shall leave to every of the said realms, lands and dominions whole and entire their priviledges, rights, and customes, and the same realms and dominions shall administer, and cause to be administered by the naturall born of the said realms, dominions, and lands.

By this, Philip (after king of Spain) could not prefer any stranger born to any office of judicature, &c. within the realm of England, or dominions of the same, nor all the time he was within this realm, ever attempted the same.

Vide Camden.
El. 322. Artic.
inter reginam
Eliz. et Francis-
cum ducem
Alonson anno

And in the articles, *De matrimonio prælocuto inter reginam Elizabetham et ducem de Alonson*, amongst others it was expressly provided, *Quod dux nullum extraneum ad aliquod officium in Anglia promovebit, et nihil in jure mutabit, &c.*

23 El. populo super importune ut nuberet suadente in comitiis.

Also

^a Also king James wisely provided by authority of parliament, by the advice of the lords spirituall and temporall, and commons in that parliament assembled, that whereas in regard of some difference and unequality of the laws, trials, and proceedings * in case of life, between the justice of the realm of England, and that of the realm of Scotland, it appeareth to be most convenient for the contentment and satisfaction of all his majesties subjects to proceed (with all possible severity) against such offenders in their own country according to the laws of the same, whereunto they are born and inheritable, and by and before the naturall born subjects of the same realm, if they be there apprehended. And by the next clause it is provided, that felonies committed by Englishmen in Scotland, shall be enquired of, heard, and determined before justices of assise, or commissioners of oier and terminer, and gaol-delivery, being naturall born subjects within the realm of England, and none other. And the like in another clause with an addition of justices of peace to be naturall born subjects within England; and God blessed and prospered this act with happy and desired successe.

^a 4 Ja. regis, ca. 1.
about the midst.

* That case being then in question.

But contrariwise, *Petrus de Rupibus*, or of the Rocks, being a Gascoign born, preferred to be bishop of Winchester by king John, and being a principall counsellor about king H. 2. both in his young years, did after in his riper age prefer to offices about the king, such Gascoigns as were of his blood or alliance, (whereof one of his kindred, some say his son, Peter de Orival treasurer of England) to the great grief and discontentment of the nobility of England to have a Gascoign born in place above them. And what heavy event ensued thereupon, let historians inform you, for it is grievous to me to remember it.

Math. Par. pag. 363. 380. 383.
&c. Hol. Chron. pag. 231. & 1071.
a. b.

If you desire to see somewhat concerning ecclesiasticall offices, promotions, and benefices, first what petitions have been made in parliament against aliens or strangers; look in the parliament rolls of 50 E. 3. nu. 96, 97. 120. 13 E. 3. nu. 23. 17 E. 3. nu. 59, 60. 18 E. 3. nu. 38. 2 R. 2. nu. 6 H. 4. nu. 48. 4 H. 6. nu. 29, &c. And what laws have been made that aliens or strangers should not be advanced to the same; *Vide* 35 E. 1. Statut. de Carlisle. 3 R. 2. ca. 3. 7 R. 2. ca. 12. Rot. Parl. 13 R. 2. not in print, 1 H. 5. ca. 7. 4 & 5 Ph. and Mar. ca. 6.

Vide 50 E. 3. nu. 165.
for the keeping of the castle of Nottingham.
Vide 18 E. 1. Rot. Parl. nu. Solomon de Rolles case.

C A P. CII.

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Forfeiture, Confiscation, &c.

NO T *A* *confiscare et forisfacere* are *synonyma*, and *bona confiscata* are *bona forisfacta*: *Fiscus* properly signifieth a panier or hamper of osiers, wherein the Romanes kept their treasure, and by the figure of *metonymia continens pro contento*, it is taken for the treasure it self, *unde confiscare*, and *bona confiscata*, and thereupon it is said, *Quod non capit Christus, capit fiscus*.

Of forfeiture of lands and tenements, and other hereditaments for

For the derivation of *forisfacere*, see the first part of the Institutes, sect. 74. fo. 59. a. 3 E. 3. forfeit 24.

* See before
cap. High trea-
son, verbo [De
tres et tene-
ments, &c.]
fol. 18. & 19.
Et cap. de Petit
treason. Verb.
[Et de tiel man-
ner de treason,]
&c. fo. 21.

^a See the 1
part of the In-
stitutes, of both
these branches.

^b See the 1 part
of the Institutes,
ubi supra, both
the former and
the latter sort.

^c 3 E. 3. Cor.
290. 312.

^d 29 E. 3. 29.
45 E. 3. Cor.
100.

3 E. 2. Cor. 367,
368.

3 H. 7. 12.

22 H. 8. c. 14.
32 H. 8. ca. 3.
See before *Peine
fort et dure* in the
next preceding
chapter.
See before in
the chapter of
Petit treason,
fo. 26.

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for high treason, petit treason, felony, misprision of treason, pre-
munire, and in some cases of misprision, * and what hereditaments
which be not holden shall be forfeited for high treason, and shall
not escheat for petit treason or felony, we have spoken before in
their severall chapters, &c. now let us speak of forfeiture of goods
and chattels in these and some other cases.

^a Of these the forfeiture of some of them must appear, or be
found of record, and therefore these cannot be claimed by pro-
scription; of other some the forfeiture need not appear, or be
found of record, and therefore these may be gained by prescrip-
tion.

^b Of the former sort be *bona et catalla proditorum, felonum, utla-
gat', in exigend' positorum, fugitivorum, deodand' annus, dies, et vastum,*
&c. and all other forfeitures which must appear or be found of re-
cord.

Of the latter sort be treasure trove, *bona et catalla waviat', extra-
hur' wreccum maris,* &c.

^c If a traitor or felon either rescue himself, or will not submit
him to be arrested, but resisteth, and in resistance is slain; upon
presentment hereof he forfeiteth all his goods and chattels.

^d If a felon in pursuit wave his own goods, they are forfeited,
yet are they not *bona waviata*.

If in appeal of robbery the plaintiff omit any of the goods stolen,
they are forfeit to the king for the favour, which the law presum-
eth, the plaintiff beareth to the felon: and for that he cannot have
restitution for more then is in his appeal.

In appeal of robbery of goods, if the jury find that the defen-
dant found them in the high way, in this case the plaintiff for his
false appeal, in seeking the blood of the innocent, shall forfeit his
goods to the king.

If one arraigned for treason or petit treason, challengeth peremp-
torily above thirty five, he forfeiteth his goods, and judgement of
paine fort et jure shall be given against him, as one that refuseth the
triall of law, by challenging three full juries, and like unto one that
stands mute and will not put himself upon the triall of the law.

By the statute of 22 H. 8. it was provided that no person ar-
raigned for any petit treason, murder or felony, shall be admitted to
any peremptory challenge above the number of twenty: but at
this day in case of high treason, notwithstanding the statute of 33
H. 8. cap. 22, 23. and petit treason notwithstanding the act of 22
H. 8. he may challenge thirty five according to the common law,
for it is enacted by the statute of 1 & 2 Ph. and Mar. cap. 10.
that all trialls hereafter to be awarded, or made for any treason,
shall be had and used only according to the due order and course
of the common law, so as to petit treason the act of 22 H. 8. is
abrogated, but in cases of murder and felony he cannot challenge
peremptorily above the number of twenty, and if he challenge
above twenty, and under thirty six, he forfeiteth not his goods
and chattels, for no law giveth forfeiture for challenging above
twenty; but the court ought to over-rule the challenge; neither is
he convicted by the challenging above twenty, as he was by the
common law by challenge of three juries, for the act of 22 H. 8.
extendeth not to any conviction, but to the challenge only.

If

If the party defendant be attached or distreyned by proces out of any court of record, county, by force of a justices, &c. hundred court, or other court baron, and make default, the goods or issues are forfeited, and upon the attachment the sherif or other officer may take the goods with them: and this is the reason that upon the attachment the sherif or other officer ought to return the certainty of the goods and the value, and it is not sufficient to return that he hath attached or distrained the defendant by goods to such a value, and so upon the distresse the issues must be returned in certain, because they are upon default to be forfeited.

What a person convict of felony before attainder shall forfeit: see the first part of the Institutes, sect. 745. verb. Attaint, fo. 391.

See *supra* in the chapter of Deodands, and in the chapter of Wreck, *vid.* Stanford Pl. Cor. fo. 183, 184. &c.

8 E. 2. Forfeit.
17. 23 E. con-
tumac. 17.
7 H. 6. 9.
26 H. 6. Attach-
ment 4.
28 H. 6. 9.
34 H. 6. 29. 49.
32 H. 6. ibidem
9 H. 7. 6. Broke
tit. Forfeit. 4.
3 El. Dier, 199.
pag. 54.
1. part of the
Institutes. § 745.

C A P. CIII.

Of the Seifure of Goods, &c. for Offences,
&c. before Conviction.

REGULARLY the goods, &c. of any delinquent cannot be taken and seised to the kings use, before the same be forfeited.

The same cannot be inventoried, and the town charged therewith, before the owner be indicted of record.

It is to be observed, that there is two manner of seifures, one verball without taking, removing, or carrying away, only to make an inventory, and to charge the town: and the other an actuall seifure, and taking away the same.

As to the first, the same is manifest by Bracton, and all our ancient authors: and let Bracton speak for them all.

Prisones imprisonati, antequam convicti fuerint, de terris suis disseisferi non debent, nec de rebus suis quibuscunque spoliari; sed dum fuerint in prisona debent de proprio in omnibus sustentari, donec per judicium deliberati fuerint vel condemnati, &c. And fo. 136. b. he saith thus, *Qui pro crimine vel feloniam magna, sicut pro morte hominis, captus fuerit et imprisonatus, vel sub custodia detentus, non debet spoliari bonis suis, nec de terris suis disseisferi, sed debet inde sustentari donec de crimine sibi imposito se defenderit, vel convictus fuerit, quia ante convictionem nihil forisfacit; et si quis contra hoc fecerit, fiat vicecom' tale bre. rex vic' salutem. Scias quod provifum est in curia nostra coram nobis, quod nullus homo captus pro morte hominis, vel pro alia feloniam pro qua debeat imprisonari, disseisfietur de terris, tenementis vel catallis suis, quousque convictus fuerit de feloniam de qua reatus est, sed quam cito*

1.
Vide 25 E. 3.
ca. 14.

2.

3.

26 Aff. p. 32.
43 E. 3. fo. 24.
44 Aff. p. 14.
7 H. 4. fo. ultimo.
Lib. 8. fo. 171.
See the 1 part of
the Institutes,
sect. 745. f. 391.
a. Bract. l. 3.
f. 123. Brit.
fo. 4. b. Fleta,
li. 1. c. 25, 26.
a Nota the ge-
nerality of these
words. Hil.
29 E. 1. Coram
rege in Aff.
Campions case.
b In this word
treason is com-
prehended.

^c Nota, Mort del home est feloniam magna. ^d Note this reason extends as well to treason, as to felony. ^e This writ is in the Regist. ^f That is, by Magna Cart. cap. 29. and that act extends to treason as well as to felony, 5 E. 3. cap. 9. Fleta, li. 2. c. 26. accord. ^g Id est, indictatus, for before indictment no verball seifure can be made, or inventory taken. Stat. de 4 E. 1. de offic. coronatoris, et aliquis culpabilis inveniatur, &c. Britton, f. 4. b. acco. d.

captus

^h So it was in Bractons time, but afterwards the township was charged and answerable for the same. Britton, fo. 18. Mirror, c. 2. § 13. Fleta, li. 1. c. 25, 26. 43 E. 3. 18. a. ^a Note the generality of these words.

^b Mic. 18 E. 1. Coram rege Ro. 34. Norff. Nisi quis appellatus indictatus vel cum manu opere captus fuerit, non competit regi secta contra ipsum.

Begging of lands and goods before conviction, &c. unlawfull.

*captus fuerit per visum custodum placitorum coronæ nostræ, et per visum tuum et legalium hominum apprecientur catalla ipsius capti, et imbre-vientur, et salvo custodiantur per ^h balivos ipsius qui capitur, et qui bonam inveniant securitatem * de respondendo coram justiciariis nostris cum ab eis exigantur: salvo tamen eidem capto et familie suæ necessariæ, quandiu fuerit in prisona, rationabili estoverio suo, &c. i. rationabili victu et vestitu. 3 E. 3. Coron. 366. 13 H. 4. 13.*

By the statute of 1 R. 3. cap. 3. it is enacted and declared, That neither sherif, escheator, bailife of franchise, ^a nor other person take or seise the goods of any person arrested, or imprisoned, before he be convicted or attaint of the felony, ^b according to the law of England, or before the goods be otherwise lawfully forfeited, upon pain to forfeit double the value of the goods so taken to the party grieved.

So as (*super toto materia*) these two conclusions are manifestly proved. First, that before indictment, the goods or other things of any offender cannot be searched, inventoried, or in any sort seised; nor after indictment seised, and removed, or taken away before conviction or attainder. Secondly, that the begging of the goods or state of any delinquent accused or indicted of any treason, felony, or other offence before he be convicted and attainted, is utterly unlawfull, because before conviction and attainder, as hath been said, nothing is forfeited to the king, nor grantable by him. And besides it either maketh the prosecution against the delinquent more precipitate, violent, and undue, then the quiet and equall proceeding of law and justice would permit, or else by some underhand composition and agreement stop or hinder the due course of justice for exemplary punishment of the offender. And lastly, when the delinquent is begged, it discourageth both judge, juror, and witnesse to doe their duty.

Cap. Itineris.

It was an article of inquiry, *de hiis qui aliquid agunt per quod veritas et justitia suffocantur.*

See Lib. 7. f. 36, & 37. the case of penall statutes, *et nota bene*: see also the statute of 21 Jac. ea. 3. à *fortiori* in case of life. *Placitum coronæ* ought not to become in effect *placitum privatum*. And if it fall out that the party accused be *legitimo modo acquietatus*, let such as begge him and prosecute against him be terrified by the villanous judgment against conspiratours, which you may read before cap. Judgements and Execution.

C A P. CIV.

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Of Falsifying of Attainders.

Syers case, anno 32 Eliz.

AT twelve sessions of the peace holden at Norwich for the county of Norfolk, anno 32 Eliz. one Syer was indicted of burglary, supposed to be committed 1 Augusti anno 31 Eliz. whereunto Syer pleaded not guilty. And upon the evidence it appeared that the burglary was committed 1 Septemb. anno 31 Eliz. so as at the time alledged in the indictment there was no burglary done:

done: and it was conceived that the very true day in the indictment was necessary to be set down in the indictment, for that the judgement doth relate to the day in the indictment, and so avoid feoffements, leases, &c. for that as it was also conceived) the feoffee, lessee, &c. when the attainder is upon a verdict, should not falsifie in the time of the felony: and thereupon the jury found Syer not guilty. And at the same sessions Syer was again indicted for the same burglary done 1 *Septembris anno* 31 Eliz. when in truth it was done. And he that gave the charge at that sessions doubted, whether upon this matter Syer might plead *auter foitz acquite* for the same burglary, (for seeing the offender is allowed no counsell, the court ought to do him justice and assigne him counsell *in favorem vite*, though he demand it not, to plead any matter in law appearing to the court for his discharge;) and thereupon he stayed the proceeding against him, and the assises being at hand he acquainted the justices of assize, Wray chief justice, and justice Peryam with this case, and with the doubts conceived thereupon; who answered him, that the like case had then been lately propounded by justice Peryam to all the justices of England; and by them three points were resolved. 1. That the crown was not bound to set down the very day when the treason, felony, &c. was done, but the day set down in the indictment being before or after the offence done, the jury ought to finde him guilty, if the truth of the case be so; and if it be alledged before the offence done, to finde the day when it was done in *rei veritate*, for they are sworn *ad veritatem dicendam*, and then the forfeiture shall relate but to the day in the verdict, which was the day of the offence done, and not to the day in the indictment. 2. That if the triers finde the offender guilty generally, yet the feoffee or lessee, &c. if the offence be alledged in the indictment before it was done to their prejudice, may falsifie in the time, but not for the offence. For seeing the crown is not bound to set down the very just day when the treason or felony, &c. is done, and that the triers have chief regard and respect of the offence it selfe, God forbid, but that the subject might falsifie as concerning the time of the offence. 3. If the offender be found not guilty, he in that case might plead upon a new indictment, *auter foitz acquite*: and so Syer in the case aforesaid did, and was thereupon discharged according to the said resolutions. Nota three notable points resolved, that never were resolved in any book that we have read, and remember.

At the assises in Lent, 32 Eliz. in com. Norff.

Nota, The resolution of all the judges.

If a man infeoffeth another of his land, and after is indicted of a felony supposed to be committed before the feoffment, and thereupon he is outlawed; the party himself is bound hereby, and cannot traverse the felony, but the feoffee, &c. may; because he is an estranger thereunto: for a false indictment without any tryall by verdict shall not binde the feoffee, &c. but that he may falsifie, either by traverse of the felony it selfe, or of the time of the feoffment.

49 E. 3. 11.
7 E. 4. 1, 2.

And so it is if a man maketh a feoffment of his land, and after taketh sanctuary, and confesse the felony before the coroner by him to be done before the feoffment, and abjureth the realm; the feoffee shall falsifie the attainder by traversing of the felony. And so it is if a man be indicted of felony, and is attainted by his own confession, the feoffee shall falsifie the attainder by denying the felony.

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11 H. 4. 94.
2 H. 5. Estop. 91.
7 E. 4. 1. 2.
Vid. Rot. Parl.
23 H. 6. nu. 32.

felony. But otherwise it is if he be attainted upon a verdict given by twelve men, for then the feoffee shall not falsifie by traversing of the offence, but of the time only.

Where the case in effect is, that 19 *Januarii anno 1 Mariæ*, a commission of oier and terminer in London was directed to Sir Thomas White the lord maior of London, and to divers others, reciting, that where Sir Robert Dudley knight, 9 *Januarii anno 1 Mariæ* was indicted of high treason before Thomas duke of Norff. and 14 others commissioners of oier and terminer in the county of Norff. (where in truth that commission was directed to so many, but the indictment was taken but before 8 of them only) granting to them or any four of them, authority to receive the indictment taken before 15 commissioners, and to proceed thereupon as speciall justices of oier and terminer, &c. By pretext whereof they proceeded: and upon the confession of the said Sir Robert Dudley, gave judgement against him in case of high treason. ^a In this case it was adjudged, that Sir Robert Dudley, then earl of Leic. might falsifie the said attainer by plea, because it was void, and *coram non judice*: for that the said latter commissioners ^b had no power to proceed upon an indictment taken before 8, but before 15, and so the judgement was void, and *coram non judice*: for wheresoever the judgement is void or *coram non judice*, the party is not driven to his writ of error, but may falsifie the attainer by plea, shewing the speciall matter which proveth it void, or *coram non judice*. In which case the party forfeiteth neither lands nor goods. By which case it appeareth how necessary it is for judges, especially in cases of treason and felony, to look into the whole record, and the proceedings thereupon, before they give judgement, lest they give an unlawfull and unjust judgment, by means whereof the party may lose his life, &c.

^c A and B were indicted, A as principall of felony, and B a accessory for receiving him. A fled and was attainted of the felony by outlawry. B the accessory (being seised of lands in fee holden of C) was arraigned upon the indictment and found guilty by verdict, and had judgement, and was hanged: C the lord entreteth as lord by escheat: A the principall reverseth the outlawry, and to the felony pleaded not guilty, and by verdict was found not guilty, and thereupon was by judgement acquitted. The heir of B, brought an assise of mordancestor against C the lord by escheat, who pleaded the outlawry of the principall, and the attainer of the accessory, his seison in fee, and the execution, and his entry as lord by escheat. ^d The plaintife shewed the reversall of the outlawry by the principall, and his acquittall by verdict and judgement, whereupon the lord demurred in judgement. And it was adjudged that the plaintife in the writ of mordancestor should recover against the lord by escheat. Upon which judgement we observe these five conclusions. 1. ^e That the attainer of the accessory hath a kinde of dependancy upon the attainer of the principall. For it is a maxime in law, that the accessory ought not to be put to answer before the principall be attainted; and by the reversall and acquittall of the principall, the dependant judgement against the accessory cannot stand. 2. ^f That this attainer of the accessory may be falsified and avoided by the heir by plea, and is not driven to his writ of error; for that the attainer of the accessory is by matter in law avoided by record of as high nature as the

Pl. com. f. 390.
Le Countee de
Leic. case.

^a Tri. 3 El.
^b V. for this
point 22 Aff.
p. 64. 39 E. 3.
33, 34. 41 Aff.
p. ult. 27 Aff.
p. 55. 39 Aff.
p. 6. 7 H. 4.
3. 9 H. 4. 1.
10 H. 6. 13.
36 H. 6. 32.
31 H. 6. 10.
4 H. 6. 24.
22 E. 4. 31. Co-
lyns case.

2 H. 3. 10.
4 H. 7. 18.
2 H. 7. fo.
Vide Rot. Parl.
18 E. 1. Rot. 11.
Mountgom. Bo-
go de Knovil,
&c.

^c See this case
temps E. 1. tit.
Mordanc. 46.
but not fully
there reported.
Vid. lib. 9.

fo. 119. Lord
Zanchers case.
^d Where the an-
cestor of the ac-
cessory was law-
fully and in due
form attainted
of felony and
yet the heire
shall inherit by
matter *ex post
facto*.

^e Vi. li. 5. fo.
119. b.
Lo. Zanchers
case. Debili fun-
damento fallit
opus. 2 R. 3.
fo. 12.

^f 26 E. 3. 57.
7 H. 6. 44.
43 E. 3. 3.
4 E. 3. 36.
11 H. 4. 4. 6.
9 H. 6. 38. b.
8 H. 4. 4.
10 H. 6. 6.
6 E. 4. 8.
8 H. 7. 10.
13 E. 4. 4.

the attainder of the principall was. For in this case it is impossible that there should be an accessory where there was no principall, of the same felony. 3. That the escheat of the land lawfully once vested shall by this matter *ex post facto*, be devested. 4. Though there were no immediate discent to the heir, yet upon the judgement of the acquittal of the principall the writ of mordancestor was maintainable. Lastly, that albeit the attainder of the accessory is avoided by judgement of law, yet the lord by escheat remain tenant of the land, until it be evicted from him by action or entry. And so it is if the principall be attainted of felony, and after the accessory is also attainted, if the principall reverseth his attainder by writ of error, the attainder of the accessory dependant thereupon is reversed.

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18 E. 4. 9. b.

A man commits treason or felony, and is thereof attainted in due form of law, and after this treason or felony is pardoned by a generall pardon; hereby the foundation it self, viz. the treason or felony being by authority of parliament discharged and pardoned, the attainder (being builded thereupon) cannot stand, but may be falsified and avoided by plea, for he hath no other remedy by writ of error or otherwise.

Dier 20 Eliz.
135. lib. 6. fo.
13, 14. in Arundels case.

In the county of Warwick there were two brethren, the one having issue a daughter, and being seised of lands in fee devised the government of his daughter and his lands, untill she came to her age of sixteen years, to his brother, and died. The uncle brought up his niece very well both at her book and needle, &c. and she was about eight or nine years of age: her uncle for some offence correcting her, she was heard to say, Oh good uncle kill me not. After which time the childe after much inquiry, could not be heard of: whereupon the uncle being suspected of the murder of her, the rather for that he was her next heir, was upon examination *anno 8 Jac. regis* committed to the gaol for suspicion of murder, and was admonished by the justices of assise to find out the childe, and thereupon bailed him untill the next assises. Against which time, for that he could not finde her, and fearing what would fall out against him, took another childe as like unto her both in person and years as he could find, and apparelled her like unto the true child, and brought her to the next assises, but upon view and examination, she was found not to be the true child; and upon these presumptions he was indicted and found guilty, had judgement, and was hanged. But the truth of the case was, that the child being beaten over night, the next morning when she should go to schoole, ran away into the next county: and being well educated was received and entertained of a stranger: and when she was sixteen years old, at what time she should come to her land, she came to demand it, and was directly proved to be the true child. Which case we have reported for a double caveat: first to judges, that they in case of life judge not too hastily upon bare presumption: and secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he offending God (the author of truth) overthrow himself, as the uncle did.

Falsifying concerning Goods.

Brañ. lib. 3. f.
128, 129. a.
Brit. ca. 12.
fol. 20.
3 E. 3. Forfeit
25. 22 Aff. 96.
13 H. 4. 13.
^a 4 H. 7. 18.

^b 3 E. 3. cor.
296. & 344.

^c 47 E. 3. 26.
13 E. 4. fo. 8. a.
Travers de chat-
tell al common
ley.

^d 27 Aff. p. 50.
41 Aff. p. 13.
44 Aff. p. 16.
Lib. 5. fo. 111.
Foxleyes case.

^e Bra. li. 3. f.
129. a. 43 E. 3.
18. 7 E. 4. 17.
a. per Cheke. 45
Aff. p. 9. Stanf.
pl. cor. 284. d.
30 H. 6. tit. for-
feit. 31. 19 E. 3.
ibid. 19. 223.

45 E. 3. Aff. 9.
*[233]
8 E. 2. cor. 406.

If A be indicted before the coroner for the death of another, and that A fled for the same; hereby are all the goods and chattels of A forfeited which he had at the time of the verdict given; and this cannot be falsified by traverse. For if the party be arraigned upon the same indictment before justices of gaole delivery, and is by verdict acquitted of the felony, and that he did not flee for the same; yet he shal forfeit his goods and chattels, but yet, ^a such a *fugam fecit* may be falsified by matter in law; for if the indictment be void or insufficient, there is no forfeiture. ^b But if a man be indicted before justices of oier and terminer, and is acquitted by verdict, and they finde further that he fled for the same, his goods are forfeited which he had at the time of the verdict given; ^c and it being also found in particular what goods he then had, that may be traversed by any that had property in those goods.

There is also a *fugam fecit* in law. ^d As if a man be indicted or appealed of felony and proces continued against him, upon his default of appearance, and an exigent awarded against him, whereupon he appeareth, albeit he be after acquitted of the felony, yet all his goods and chattels are forfeited by the awarding of the exigent upon this *fugam fecit* in law. ^e But this may be falsified by matter in law: for if the indictment or writ of appeal be insufficient, or error be in the proces or exigent the same may be avoided by exception, and no forfeiture of goods. And there is no book to warrant the opinion of justice Stanford * in this case: for in 43 E. 3. the originall writ was good, *quod adnoto, non ut arguam, sed ne ipse arguar.* And also by matter in deed or record he may excuse his absence, as if he were in prison or beyond the sea, at the time of the exigent awarded, or if the king before the exigent doth pardon him.

A is indicted of petit larceny, and upon his triall is found not guilty, and that he did flye for the same, he shall forfeit his goods. And so it is if an exigent be upon such an indictment awarded against him: but he may falsifie the same to free him of the forfeiture of his goods by such means as is aforesaid. See the first part of the Institutes, sect. 745. fol. 391. a.

Hæ leges vitam vestram (generosa juventus)

Instituunt, quæ sunt fugienda, sequendaq; monstrant.

C A P. CV.

O F P A R D O N S.

WE have spoken of the royall and establishing vertue of justice: royall and establishing I say, because *justitia firmatur solium*, by justice the royall throne is established.

Prov. 16. 12.

We are now to speak of his mercy: for the same Holy Spirit saith, *Misericordia et veritas custodiunt regem, et roboratur clementia thronus ejus*. Mercy and truth preserve the king, and by clemency is his throne strengthened. And hereupon is the law of England grounded. *Non solum sapiens debet esse rex, sed et misericors, ut cum sapientia misericorditer sit justus, &c.* Quibus tamen et qualiter est miserendum, doceant eum merita vel immerita personarum, &c. Of this royall vertue we shall speak the more willingly, for that (as it hath appeared before in the chapter of Sanctuary) all sanctuaries and places of refuge for safeguard of life are taken away. And where Bracton in the same place speaking of the kings mercy saith, *Nihil tam proprium est imperii quam legibus vivere*, it is to be observed, that the lawes of this realm have in some sort limited and bounded the kings mercy, as shall appear hereafter. And for as much as his mercy is conveyed unto his subjects by his pardons, we shall now speak thereof, being led thereunto by the book in 9 E. 4. where it is holden *a chescun roy appent per reason de son office a faire justice et grace; justice in execution des leyes, &c. et grace de granter pardons, &c.*

Prov. 20. 28.

Bract. lib. 2. fo.

9 E. 4. 2. a.

^a A pardon is a work of mercy, whereby the king either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporall or ecclesiasticall: ^b all that is forfeited to the king by any attainder, &c. he may restore by his charter: but if by the attainder the blood be corrupted, that must be restored by authority of parliament.

^a Seneca, lib. de Clementia, ca. 24. Remissius imperanti melius paretur.

^b See the first part of the Inst. sect. 1. fo. 8. and sect. 646, 647. See after cap. Restitution.

* Rot. par. 17 R. 2. nu. 11. &c.

^c 27 H. 8. cap. 4. Hil. 29 E. 1. coram rege Heres. Jo. fil. Philippi Perpoint. 1 H. 4. fo. 37. 17 H. 6. protect. 57.

We call it in Latin *perdonatio*, and derive it à *per et dono*: *per* is a preposition, and in the Saxon tongue is *for*, or *vor*: as to forgive is throughly to remit, and * forethink is to repent, and forbear is to bear with patience, as it is said, *leve est ferre, perferre grave*.

^c All pardons of treason or felony are to be made by the king, and in his name only, and are either generall or speciall. All pardons either generall or speciall, are either by act of parliament (whereof the court in some cases shall take notice) or by the charter of the king, (which must always be pleaded.) And these againe are either absolute, or under condition, exception, or qualification: for some of those pardons last mentioned the party may have a writ of allowance, or take an averment in certain cases, in others the party may be aided by averment only, where no writ of allowance doth lie.

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And first of generall pardons. Generall pardons are by act of parliament, if any of these pardons be generall and absolute, the

11 H. 4. fo. 41.
28 H. 8. Dier
28. 3 Mar. ibid.
200. 26 H. 8.

fo. 7. There is
a very generall
and absolute
pardon. Ro. par.
15 H. 6. nu. 31.
33 H. 6. nu.
29. &c.

* This is put but
for an example,
but care must be
taken, that what
generall pardon
soever be pleaded
the first clause of
the pardon of
discharge, &c. be
truly alledged.
For the expofi-
tion of generall
words, see L. 5.
fo. 47. Littletons
case. Ibid. fo. 46.
Franklyns case.
Ibid. fo. 43.
Drywoods case.
Ibidem 49. b.
Wirrals case.
Li. 6. fo. 79, 80.
Sir Edw. Fittons
case. Li. 6. f. 13.
b. Li. Keylw.
8 H. 8. 187.
ibid. 10 H. 8.
fo. 198. a. ter.

* These aver-
ments (as you
perceive) may be
taken without
any writ of al-
lowance. 8 E. 4.
3. 4 H. 7. 8.
Li. 8. fo. 68.
Trollops case.
Vid. l. 6. fo. 13,
14. in Arundels
case. A case of
Burton.

Hil. 29 El. the
resolution of all
the justices.

court must take notice of them, though the party plead it not, but would wave the same. But in these dayes the generall pardons have so many qualifications and exceptions of offences and things, and of persons also, that the court cannot take notice of them, neither can the party take benefit or advantage thereof, unlesse he plead it: and for that it may concern the safety and quiet of many a subject, we have expressed the form of the pleading of a generall pardon, and have it set down here in Latin: but if the offence be objected in the star-chamber, or any other English court, then it must be pleaded in English.

*Et præd. A. per B. attornatum suum venit, &c. (or in propria persona) et dicit quod dominus Jacobus rex nunc ipsum A. occasione præmissa impetere seu occasionare non debet: quia dicit, quod per quendam actum in parlamento dicti domini regis nunc tent' apud Westm' in com' Midd' nono die Februarii anno regni sui septimo, inter alia, inactitat' et stabilitum existit autoritate ejusdem parlamenti, * quod omnes et singuli subditi dicti domini regis tam spirituales, quam temporales hujus regni Angliæ, Wal-liæ, insularum Fernsey, et Garnsey, et villæ Barwic, hæredes, succes-sores, executores, et administratores sui, et eorum quilibet, ac omnia et sin-gula corpora aliquo modo corporata, civitat', burghi, comitat', riding, hun-dred, lath, rape, wapentag', vil', villat', hamlet' et tithing, et eorum quilibet, ac successor, et successores eorum, et cujuslibet eorum autoritate ejusdem parlamenti acquietarentur, perdonarentur, relaxarentur, et exo-nerarentur versus dictum dominum regem, hæredes et successores suos et quemlibet eorum de omnibus proditionibus, felonis, offensis, contempt', transgress', intrationibus, injuriis, deceptionibus, malegesturis, forisfac-turis, penalitatibus, et summis pecuniæ, pænis mortis, pænis corporalibus, et pecuniariis, et generaliter de omnibus aliis rebus, causis, querelis, sectis, judiciis et executionibus in prædicto actu non exceptis, neque forpris', quæ per ipsum dominum regem aliquo modo, seu per aliquem modum perdonari potuerunt ante et usque nonum diem Novembris tunc ultim' præterit' ante editionem actus prædicti, cuilibet, aut alicui suorum subditorum, corporum corporat', civitat', burgorum, comitat', riding, hundred, lath, raparum, wapentag', villæ, villat', et tithing, vel aliquorum aliorum prout in actu prædicto plenius continetur. Et idem A. dicit quod * offensa prædicta versus ipsum in forma prædicta objecta non est in actu prædicto ex-cepta, neque forprisata. Et quod ipse est et tempore editionis actus præ-dicti fuit subditus et ligeus dicti domini regis nunc natus sub obedientia sua, videlicet apud Westm' prædict', quodque ipse non est aliqua per-sona in actu prædict' except' neque forprisat'. Et hoc paratus est veri-ficare, unde non intendit quod dictus dominus rex nunc ipsum A. occasione præmissa impetere seu occasionare velit, unde petit judicium. Et quod ipse de præmissis prædict' exoneraretur, et quod generalis pardonatio præ-dicta ei allocatur, &c. See before cap. of Falsifying of Attainders.*

By the generall pardon of 28 El. all felonies are pardoned, bur-glary excepted. Hil. 29 El. it was resolved by all the justices, that a man being attainted of burglary was excepted, for the bur-glary remains, and is made more apparant by the attainder, and the offence of burglary is the foundation.

The most beneficiall generall pardons for the subject were those of the fift, and thirteenth years of the reign of queen Elizabeth, as by comparison of those with others, will to the judicious reader easily appear. The best generall pardon in all king James time, was that of the 21 year of his reign, as by comparison of that
with

with any of his former, will evidently appear, and were too long here to be rehearsed.

And now of particular pardons. No particular pardon, be it at the coronation, or any other, of any offence or offences whatsoever, that is absolute without any * condition, &c. need any writ of allowance, but when the pardon is conditional by force of the act of 10 E. 3. cap. 2. there a writ of allowance out of the chancery testifying that the condition is performed, viz. surety found according to that act may be had, or the party may plead the finding of surety, &c. and vouch the record.

The most large and beneficial pardons by letters patents, that we have read, and doe remember, were that to William Wickham bishop of Winchester (for good men will never refuse God and the kings pardon, because every man doth often offend both of them) and that other to Thomas Woolsey cardinall, which are learnedly and largely penned.

But let us turn our eye to ancient charters of pardon, and consider well of them.

*Edwardus Dei gratia rex Angliæ, dominus Hiberniæ, et dux Aquit', omnibus balivis et fidelibus suis, ad quos presentes lre. pervenerint, salutem. Sciatis quod pro bono servitio quod Johannes Chaumprona de Thornton in Pickerings, in partibus Scotiæ nobis impendit, perdonavimus ei sectam pacis nostræ, quæ ad nos pertinet * pro morte Isabellæ, quondam uxoris suæ, unde indictatus est, et firmam pacem nostram ei inde concedimus. Ita tamen quod stet recto, si quis versus eum inde loqui voluerit. In cuius rei testimonium has literas nostras fieri fecimus patentes. Teste me ipso apud Roukesburge, nono die Febr. anno regni nostri tricesimo.*

Edwardus Dei gratia rex Angliæ, dominus Hiberniæ, et dux Aquitan', omnibus balivis et fidelibus suis, ad quos presentes literæ pervenerint, salutem. Sciatis quod pro bono servitio quod Galf. filius Warnum in partibus Scotiæ impendit, perdonavimus eidem Galfro. sectam pacis nostræ quæ ad nos pertinet, de homicidiis, roberiis, latrocinis, fractionibus domorum, felonis et aliis transgressionibus contra pacem nram. in regno nro. factis, unde indictatus est, et similiter transgressionem quam fecit ab ecclesia de Watford, in quia aliquamdiu pro timore inimicorum suorum se tenuit fugiendo, et se secundum legem et consuetudinem regni nostri iusticiar' non permittendo, et etiam utlagariam, si qua in ipsum ea occasione fuerit promulgata, et firmam pacem nostram ei inde concedimus. Ita tamen quod stet recto in curia nostra, si quis versus eum loqui voluerit de homicidiis, roberiis, latrocinis, fractionibus, felonis et transgressionibus prædictis. In cuius rei testimonium has literas nostras fieri fecimus patentes. Teste me ipso apud Lincolne vicesimo secundo die Januarii anno regni nostri tricesimo, per breve de privato sigillo.

It appeareth by this record, that the said Jeffry was indicted for the death of a man, and of divers burglaries and felonies, and being thereupon arraigned prayed his clergy, *sed salvo sibi privilegio clericali posuit se super patriam*, and was found not guilty, &c. in the proceeding whereof there was manifest error, and obtained the said pardon. Herein divers things are observable; first, that the pardon is de * homicidiis, and not de murtheris, neither have we seen any pardon of murder by any king of England by expresse name. Secondly, by these ancient words the king doth pardon *sectam pacis nostræ, quæ ad nos pertinet de homicidiis, &c. et firmam pacem nostram*

Hil. 26 E. 3.
Coram rege rot.
21. Wiltes.
3 H. 7. 7. 2.
this statute expounded, and this act extend to felony, and not to treason.
Rot. pat. 21 Julii anno 1 R. 2.
Rot. pat. 12 Feb. 21 H. 8. great offences need great pardons, little offences are soon forgiven.
Hil. 29 E. 1.
Coram rege Hereford.
Johannes fil. Ph. Perpoint, &c.

* It appeareth by the record that he killed her per infortunium.

Delib. gaolæ de Windeffore, coram Hugone de Braund, et Johanne Neprunt die Jovis proximi post claus. Pasc. anno 25 E. 1.

* For this word homicide, see in the chapter of Murder. See Hil. 31 E. 3. Coram rege rot. 7. Northumb. 9 E. 4. 28.

8 H. 4. fo. 22.
Li. 6. fo. 13. b.

34 H. 6. 3. a.
35 H. 6. 1. a.
11 H. 7. 10.
Li. 6. f. 79. 1.
8. 68. Lib.
Keylw. 8 H. 8.
fo. 187. 2 R. 2.
4. b. simile.

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* Pl. com. f.
401. Coles case.
37 H. 6. fo. 21.
Quatermains
case. Li. 5. fo.
49. Vaughans
case. Li. 6. fo.
13. Cases de
pardon.
20 El. Dier 135.
Exod. 21. 12,
13, 14. Deut. 19.
13. Non misere-
beris ejus, &c.
a 2 E. 3. c. 2.
14 E. 3. ca. 14.
10 E. 3. ca. 2.
b 2 E. 3. c. 2.
4 E. 3. ca. 13.
Rot. Par. 13 E. 3.
nu. 10.
c 27 E. 3. c. 2.
Trin. 30 E. 1.
Rot. 2. coram
rege London,
anno 29 E. 1. A
pardon of death,
ad instantiam
Johan. Bute-
court. Mich.
33 E. 1. coram
rege Ro. 65. a
pardon ad requi-
sitionem H. de
Bohun, count.
Heref. & Essex.
d 13 R. 2. sta. 2.
c. 1. 16 R. 2.
ca. 6. 9 E. 4.
fo. 26. b.
e 1 E. 3. f. 24.
f 8 H. 6. 20.
4 E. 4. fo. 10.
g Li. 6. fo. 15.
9 E. 4. 26. b.
per Billing chief
justice.

ei inde concedimus. This *secta pacis* is by indictment, which is the kings suit, and, as it were, his declaration. Thirdly, that the king of ancient time did not pardon *homicidium*, &c. but *sectam pacis nostræ quæ ad nos pertinet de homicidiis*, &c. yet when he pardoned, and released the suit or mean, viz. *sectam pacis*, &c. the offender was discharged of the homicide it self, *in diebus illis*, but at this day the offence it self is pardoned, which is the surest way.

The king brought an action of debt upon an obligation, the defendant pleaded *non est factum*, and at a *nisi prius* it was found the deed of the defendant; and before the day in bank, the king pardoned the defendant all debts, querels, &c. and after the king had judgement, and sued out execution, and the defendant came and pleaded the pardon, and it was adjudged that in the kings case, he might plead the same, though he had no day in court, because he could not have an *audita querela*, or a *scire fac'* against the king, and therefore if he could not plead it, he should be without remedy, but against a common person he could not plead it, because he ought to have an *audita querela*, or a *scire fac'*. And in this case it is observable, that albeit by the judgement a new title to the said debt is accrewed to the king of record after the pardon, the obligation at the time of the pardon being but a matter in fact, yet for that the obligation was the * foundation of the debt, and the matter whereupon judgement was given, and by the pardon the debt due by the obligation was extinct, the judgement thereupon cannot bind, but is to be avoided by pleading the pardon.

What things the king may pardon, and in what manner, and what he cannot pardon, falleth now to be treated of.

^a In case of death of man, robberies, and felonies against the peace, divers acts of parliament have restrained the power of granting charters of pardons. First, that no such charters shall be granted but in case where the king may doe it by his oath. ^b Secondly, that no man shall obtain charters out of parliament, and accordingly in a parliament roll it is said; [for the peace of the land it would much help, if good justices were appointed in every county, if such be let to mainprise doe put in good sureties, as esquires or gent. and that no pardon were granted but by parliament.] Thirdly, for that the king hath granted pardons of felonies upon false suggestions, ^c it is provided, that every charter of felony which shall be granted at the suggestion of any, the name of him that maketh the suggestion shall be comprised in the charter, and if the suggestion be found untrue, the charter shall be disallowed. And the like provision is made by the statute of 5 H. 4. cap. 2. for the pardon of an approver.

^d Fourthly, it is provided that no charter of pardon for murder, treason, or rape, shall be allowed, &c. if they be not specified in the same charter.

Before this statute of 13 R. 2. by the pardon ^e of all felonies, treason was pardoned, and so was murder, &c. ^f At this day by the pardon of all felonies, the death of man is not pardoned. These be excellent laws for direction, and for the peace of the realm. ^g But it hath been conceived, (which we will not question) that the king may dispense with these laws by a *non obstante*, be it generall or speciall, (albeit we find not any such clauses of *non obstante*, to dispense with any of these statutes, but of late times) these

these statutes are excellent instructions for a religious and prudent king to follow, for in these cases, *ut summæ potestatis regis est posse quantum velit, sic magnitudinis est velle quantum possit*. Hereof you may read more in justice Stanford, lib. 2. cap. 35. in divers places of that chapter, of his grave advice in that behalf. Most certain it is, that the word of God hath set down this undisputable generall rule, ^h *Quia non profertur cito contra malos sententia, filii hominum sine timore ullo perpetrant mala*. And thereupon the rule of law is grounded. ⁱ *Spes impunitatis continuum affectum tribuit delinquendi. Et veniæ facilitas incentivum est delinquendi*. This is to be added, that the intention of the said act of 13 R. 2. was not that the king should grant a pardon of murder by expresse name in the charter, but because the whole parliament conceived, that he would never pardon murder by speciall name for the causes aforesaid, therefore was that provision made, which was (as in other cases I have observed) grounded upon the law of God, *Quicumque effuderit humanum sanguinem, fundetur sanguis illius; ad imaginem quippe Dei creatus est homo. Nec aliter expiari potest, nisi per ejus sanguinem, qui alterius sanguinem effuderit*. And the words of every pardon is after the recitall of the offence, *Nos pietate moti, &c.* See before in the chapter of Murder, and in the second part of the Institutes, stat. de Glouc. ca. 9. and the Register, fo. 309. pardon of the king, *de morte per infortunium, se defendendo, vel per lunaticum, vel per furiosum*.

By the ancient and constant rule of law, *Non potuerit rex gratiam facere cum injuria et damno aliorum; quod autem alienum est, dare non potest per suam gratiam*.

In an appeal of death, robbery, rape, &c. the king cannot pardon the defendant, for the appeal is the suit of the party, to have revenge by death: and whether the defendant be attainted by judgment, &c. or by outlawry, the pardon of the king shall not discharge the defendant. * In an appeal, the defendant wages battail, the plaintiff counterpleads, for that the defendant brake prison, if the king pardon the breaking of prison, the counterplea fails: note the breaking prison is a collateral act: and yet in divers cases at the only suit of the party, when the defendant either by the common law, or by any statute (besides the restitution, or damage of the plaintiff) is thereby also to have an exemplary punishment, the king may pardon the same. For example, in an attaint by A. against the party, and the petit jury; against the party to have restitution, this the king cannot pardon: against the petit jury, by the common law that they should lose *liberam legem*, their wives and children cast out of their houses, their houses wasted, their trees prostrated, their meadows ploughed up, their goods and chattels seised, and their bodies taken, this the king may pardon, because it is a punishment exemplary to deter others, and tendeth not to the restitution or satisfaction of the plaintiff.

Now to take an example upon a statute: *De pueris masculis sive fœmellis (quorum maritadium ad aliquem pertineat) raptis et abductis, si ille qui rapuit non habens jus in maritagio, licet postmodum restituat puerum non maritatum, vel de maritagio, satisfecerit, puniatur tamen pro transgressione per prisonam duorum annorum*. In this case the party being satisfied, the king may pardon the imprisonment by two

^h Eccles. 8. 11.

ⁱ Regulæ.
Maledictus est
qui peccat sub
spe.

Genes. 9. 6.
Num. 35. 33.

Braet. 1. 3. f.
132.

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11 R. 2. Chre.
17. 2 R. 3. fo. 8.
See 4 Mariæ
Dier 133.
* 2 E. 3. Cor.
134.

13 E. 4. 5. a.

W. 2. ca. 35.
anno 13 E. 1.

Pasch. 34 E. 1.
Coram rege Rot.
30 Kanc, in
Ravishment de
gard.

See the first part
of the Institutes.
W. 2. ca. 35.

* Nota de eo
quod ad regem
pertinet.

Anno 1 E. 2.

Trin. 40 El.
Coram rege in
appeal de mur-
dro. Inter
Shugborough &
Buggins.
Li. 5. fo. 50. &
110. b. 15 H. 7.
9. 4 H. 7. ca. 13.

3 E. 3. Aff. 445.
16 E. 3. Grant.
53. 35 H. 6. 29.
per Fortescue.
37 H. 6. 4. b.
Pl. com. 487. in
Nichols case.

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4 E. 4. fo. 4. 12.

11 H. 4. 43.
37 H. 6. 4. b.
1 H. 7. 10. b.

1 H. 7. 3.
37 H. 6. 4.
See before ca. 88.
Against vexa-
tious relators,
&c. in fine.
* 3 H. 8. c. 12.
&c.

years, for that was added as a punishment exemplary, *puniatur*, &c. And this doth notably appear by a charter of pardon which king E. 2. made after this statute. *Rex de gratia sua speciali perdonavit Godithæ, quæ fuit uxor Roberti de Waldisch, id quod ad ipsum pertinet, de transgressione quam ipsa Goditha fecit Agathæ, quæ fuit uxor Johannis de Waldisch de Ellam, rapiendo et abducendo Johannem fil' et hæredem Johannis de Waldisch infra ætatem existentem, cujus maritag' ad ipsam Agatham pertin', unde ipsa Goditha coram domino E. quondam rege Angliæ patre ipsius regis convicta fuit, et per considerationem cur' dicti patris prisonæ adjudicata per biennium ibidem moratura, et etiam tempus imprisonamenti quod adhuc restat de biennio prædicto. Ideo vult idem rex quod præfata Goditha * de eo quod ad ipsum pertinet pro transgressione prædicta sit quietæ, et quod à prisona prædicta, si pro eo quod ad ipsum regem inde pertinet, et non alia de causa detineatur in eadem, deliberetur. Teste rege apud Westm' 8. die Maii anno regni sui primo. Ideo ipsa Goditha inde quietæ quoad hoc, quod ad dominum regem inde pertinet, &c.*

See more of this matter, 3 El. Dier 201, 202. 9 El. Dier 261, Musgraves case. 16 El. Dier 323, Taverners case.

The defendant in an appeal of murder upon not guilty pleaded, was found guilty of manslaughter: and it was resolved by the justices upon conference between them, that the queen might pardon the burning of the hand, for that is no part of the judgement at the suit of the party plaintiff in the appeal, but it is a collaterall, and exemplary punishment inflicted by the statute of 4 H. 7. cap. 13.

In some actions wherein the subject is sole party (as appeareth by that which hath been said) some things the king may pardon: so on the other side, where the king is sole party, yet some things there be, that he cannot pardon. As for example; for all common nuisances, as for not repairing of bridges, high-ways, &c. the suit (for avoiding of multiplicity of suits, which the laws abhorre, and that *nulli magis tueri rempublicam creditum est quam regi*) is given to the king only, for redresse, and reformation thereof, but the king cannot pardon, or discharge either the nuisance, or the suit for the same; for, as Bracton saith, *Non poterit rex gratiam facere cum injuria et damno aliorum*. See Glanvill li. 7. cap. 17. vers. finem.

The customer albeit the bond and surety be made to him for the importing of bullion according to the statute of 14 E. 3. cap. 1. yet cannot he release it, *quia pro bono publico*. If one be bound in a recognisance, &c. to the king to keep the peace against another by name, and generally all other lieges of the king; in this case, before the peace be broken, the king cannot pardon or release the recognisance, although it be made onely to him, because it is for the benefit and safety of his subjects.

After an action popular be brought, *tam pro domino rege, quam pro seipso*, according to any statute, the king cannot discharge but his own part, and cannot discharge the informers part, because by the bringing of the action he hath an interest therein: but before action brought, the king may discharge the whole, (* unless it be provided to the contrary by the act) because the informer cannot bring an action or information originally for his part only, but must pur-
sue

due the statute: and if the action be given to the party grieved, the king cannot discharge the same.

All suits in the star-chamber, though exhibited by the party, are informations for the king, and the king may pardon them, but after judgement (and damages, if any be given) and costs taxed, the king cannot pardon them.

^a And that party which informeth not the king truly, is not worthy of his grace and forgiveness, and therefore either *suppressio veri*, or *expressio falsi* doth avoid the pardon.

^b A man commits felony, and is attainted thereof, or is abjured for the same, the king pardoneth him the felony without any mention of the attainder, or abjuration, the pardon is void. ^c But if a man be attainted of burglary, and by the generall pardon all felonies, &c. are pardoned (except all burglaries) the attainder and burglary be excepted, as before is said.

The king pardoneth to A. a felony whereof he standeth indicted, or indicted and attainted, &c. and in truth he is not indicted, nor attainted, &c. this is *expressio falsi*, and maketh the pardon void. A is outlawed, and the king pardons him the outlawry, and all his goods; it is void for the goods, for he must have a grant of them.

If a man be indicted of felony, and the king reciteth the same, and pardoneth the felony contained in the indictment, and all outlawries thereupon, if any be, this is a good pardon of the outlawry, though it be doubtfully alledged, and the king not certainly informed.

The king may pardon one convict of heresie, or of any other offence punishable by the ecclesiasticall law. In all proceedings in the ecclesiastical court *ex officio*, the king may pardon the offence. The king may also pardon piracy upon the sea; but by what word, and in what manner, see before in the chapter of piracy.

All the justices of England being assembled at Serjeants Inne in Fleetstreet, when I served queen Eliz. as her attorney generall, I moved this case unto them. A man seised in fee of two mannors, the one holden of the queen by knight service *in capite*, and the other holden of a common person, alieneth both, and the alienee sueth out a pardon for both, in which pardon the words are, *quæ de nobis tenentur in capite per servic' militare, ut dicitur*, and after this pardon being transcribed into the exchequer, processe goeth out against the alienee, who pleadeth the pardon, beginning his plea thus, *Quibus lectis et auditis idem A. queritur se colore præmissorum graviter vexatum et inquietat' fore, et hoc minus juste: quia dicit quoad eadem domina regina per literas suas patentes, &c.* and plead the letters patents of pardon, as they be with the said clause of *ut dicitur*, and after he alieneth the manor which *in rei veritate*, was not holden: the question was, whether the second alienee may plead the truth of the matter or ought to be concluded by the pardon and plea of the first alienee. And first the justices had consideration of the books in 29 Aff. pl. 38. 46 E. 3. 33. Pl. com. 398. 7 E. 6. tit. Estoppel. Br. 222. And in the end it was resolved by all the justices, that the pleading of the pardon or of a license, as it is, is no conclusion for no more then the pardon or license being not positive or affirmative, but (*ut dicitur*) is a conclusion; no more is the

Lib. 5. fo. 50.
Buggins case.
Eodem li. fo. 51.
Hals case.

^a Prov. 20. 28.
Misericordia et
veritas custodi-
unt regem.

^b 9 E. 4. 28.
19 E. 3. Cor.
124. 6 E. 4. 4.
per Cheke.

11 H. 4. 16.

^c Lib. 6. fo. 13.

F. N. B. 225. c.

9 H. 5. 14, 15.

F. N. B. 269.
20 El. Dier, 135.
Li. 6. fo. 13, 14.
Li. 5. fo. 51.
Hals case.
Regist. 67.
Mic. 37 & 40
El. Resolution
of the justices
concerning par-
dons and licences
of alienation
and the pleading
of them, &c.

29 Aff. pl. 38.
46 E. 3. 33.
Pl. com. 398.
7 E. 6. tit. Estop.
Br. 222.

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the pleading of them with the clause of (*ut dicitur*) any conclusion. And conclusions shall not be wrought by inference or implication of a thing that is not directly alledged. But if the pardon or license had been affirmative and direct without the clause, *ut dicitur*, it had been a conclusion, and so had the pleading thereof been also. Lastly, it was resolved, that in case of the pardon or license with the clause, *ut dicitur*; if the party confesse the tenure that plead the same: as to say, *bene et verum est*, that the land is holden by knights service *in capite*, and plead the pardon or license, this shall conclude: and some of the barons said, that according to these resolutions it hath been used in the exchequer, and many presidents be there accordingly: and by these resolutions the books abovesaid shall the better be understood.

34 H. 6. 3.
21 E. 4. 46.
2 R. 3. 4. lib. 5.
fo. 56.

If the king release to A all debts, and in truth A and B be indebted, this shall not discharge B: but otherwise it is in the case of a subject, for in that case the release to one dischargeth both.

If one be indebted to the king, if the king pardon or release the debt, the action and suit for the debt is discharged, and if he pardon or release the action and suit, the debt is discharged: and so it is in both these cases in the case of a subject.

22 Aff. pl. 37.

A man is indicted of trespassse and outlawed at the suit of the king. *Rex pardonavit utlegariam in eum promulgat*, et *quicquid ad eum pertinet*, and notwithstanding the defendant shall make fine, for it seemeth that these words, *quicquid ad eum pertinet*, without any reference, are too generall to dispense with the fine.

Pasch. 4 E. 3.
Coram rege.
rot. 38.

We finde also a discharge of further proceeding directed to the judges of the court, &c. (not by any pardon of the offence) but by the kings acknowledgement under the great seale of the parties innocency, with commandement to the judges, that in the former proceedings and proces, &c. they shall altogether surcease: whereupon the court will award that the party shall go *sine die*, and that there shall be no further proceeding against him: as taking one example for many. William de Melton archbishop of York was accused in the kings bench *coram rege et concilio suo*, in anno 3 E. 3. for adherency to Edmond earle of Kent in his treasons, whereunto the archbishop pleaded not guilty; and after two writs of *venire fac.* awarded, the king directed his writ under the great seal to the judges of the kings bench, to this effect. *Licet venerabilis pater Willielmus archiepiscopus Eborum, et Stephanus London episcopus, per diversa br'ia nostra coram nobis ad sectam nostram implacitentur de eo quod ipsi Edmundo nuper comiti Kantie adhæsisse debuerant: quia tamen prædict. archiepiscopus et episcopus de adhæsiōe prædict. omnino immunes reputamus: vobis mandamus, quod placitis prædictis coram nobis ulterius tenen' omnino supersedeatis. Teste me ipso apud Westm. 12 die Decembr. anno regni nostri 4.* The award of the court that is given thereupon, is very observable, *viz. Cujus brevis prætextu, consideratum est, quod prædict. archiepiscopus eat inde sine die, &c. Et ulterius non procedatur versus eum.*

Pasch. 4 E. 3.
Coram rege.
rot. 53.

Stephen Gravesend bishop of London was charged with the same offence in parliament, anno 3 E. 3. whence by order of parliament the matter was referred to the kings bench to be tried, where he pleaded not guilty, and after was discharged *ut supra*, by the same writ. These men (it may be) thought that the taking of the pardon should

should be an implied confession of the fault, and therefore went a new way: but no man that is wise and well advised will refuse God and the kings pardon how often so ever he may have it; for there is no man but offendeth God and the king almost every day, and the pardon is the safest and surest way.

If a man be indicted of felony, and found guilty, and being in prison the king may under the great seale reciting the offence, &c. retain him to serve in his wars on this side or beyond the seas: this charter he may plead, and the court ought to allow it. As for example: *Quidam indictatus de feloniam, et inde culp. dicit quod rex eum conduxit, et inde producit cartam, quod rex eum conduxit in vasc. in exercitu, et dicta carta allocata fuit per curiam.* But a protection lyeth not in that case: because a protection is a formed writ, and cannot have such a recitall of the truth of the case: and ^a writs of protection lye not in case of felony, nor is it to be allowed to any that is prisoner to the court.

^b One indicted of felony, without any learned counsell, shewed forth a charter of pardon which was discordant to the indictment, and also to his name; and because the court perceived that it was the kings meaning he should be pardoned, he was remanded to get a better pardon.

^c What things be requisite to a pardon of outlawry, see the statute of 5 E. 3. cap. 12.

^d When the parties defendants appeared to the court to be poore, and were to be amerced or fined, the entry of ancient time was, *perdonantur per justic' quia pauperes.*

^e It is observed that repeals by parliament of pardons lawfully and duly obtained, have been seeds of great discontentment, and of evill event.

^f Generall pardons have been often granted at the petition of the commons, for they know best, where the shooe wringeth them, and wherein, and how they are to be eased.

So odious was perjury, that by the law of God it was not to be pardoned: *Non misereberis ejus, &c.*

Pasch. 22 E. 3.
tit. cor. 239. Co-
ram rege.

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^a 7 E. 4. 29. a
acc' 30 H. 6. 3.
See the first part
of the Institutes.
sect. 199.

^b 26 Ass. p. 46.

^c 5 E. 3. cap. 12.

^d Pasch. 8 E. 1.

in banco Rot. 79.

Abbas de Bur-

ton, &c.

^e Vid. Rot. Parl.

21 R. 2. nu. 12,

13, &c.

^f 36 E. 3. ca. ult.

4 R. 2. nu. 30,

31, 32.

1 H. 4. ca. 20.

2 H. 4. ca. 13.

5 H. 4. ca. 15.

4 H. 5. cap. 8.

a short and effec-

tuall pardon,

and many others.

Deut. 9. 21.

C A P. CVI.

OF RESTITUTIONS.

THERE is another work of grace and mercy, that is, when any man or woman being attainted of high treason, petit treason, or felony, (whereby the blood is corrupted, &c.) or his or her heir is restored.

And seeing we have formerly spoken how far, and to what intent in those cases, the king of his grace may by his charter of pardon restore the party: we shall now treat of the restitution of the delinquent, or of his or her heirs by parliament. Attainders ought to be had upon plain and direct evidence, (as before is said) for if the party be executed, restitution may be had of his lands,

&c.

See the first part
of the Institutes,
sect. 1. fo. 8. a.
& 646, 647. 745.
Vid. cap. Par-
don. fol. 233.

* Gen. 40. 13.
Job 12. 23. 42.
10. Restitutio
secundum quid,
seu in partem.
Restitutio in in-
tegrum.

Brit. ca. 13.
fo. 23. 10 Eliz.
Dier 274.

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3 E. 6. tit. Resti-
tution. Br. 37.
See the first part
of the Institutes.
sect. 646, 647.
745. fo. 392.
verb. *Le sank est*
corrupt, &c.
a See 10 El.
Dier ubi sup.
41 E. 3. 5. b.
27 Aff. p. 48.
17 E. 3. 40.
5 E. 3. 66.
29 E. 3. 7.
20 Eliz. Dier
360. Pl. Com.
252. a. 16 E. 3.
Livery 30.
44 E. 3. 45.
18 E. 3. 21, 22.
24 E. 3. 29.
40 E. 3. grant 50.
b Mich. 8 E. 1.
in Banco. Rot.
62. Norff.
Rot. Par. anno
4 E. 3. nu. 18.
on the backside
of the roll.

* An example
of restitution in
blood only.
11 H. 4. nu. 42.
13 H. 4. nu. 19,
20.

&c. but not of his life. Generally, *Restituere nihil aliud est, quam*
* *in pristinum statum reducere.*

Of restitutions by parliament some be in blood only, (that is to make his resort as heir in blood to the party attainted and other his ancestors, and not to any dignity, inheritance of lands, &c.) and this is a restitution *secundum quid*, or in part. And some be generall restitutions, to blood, honours, dignities, inheritance, and all that was lost by the attainder: and that is *restitutio in integrum*, with an addition sometimes, that it shall be lawfull for the party restored and his heirs, to enter, &c. Of the first you may reade in Dier 10 Eliz. fo. 274. in Petition: and Rot. Par. 23 Eliz. of the earl of Arundel, &c. Of the second you may reade 15 E. 3. tit. Petition 2. 3 H. 7. fo. 15. a. 10 H. 7. 22, 23. pl. com. fo. 175. Rot. Par. 13 H. 4. nu. 20, &c. Of both of them you may reade plentifully in our books, and parliament rolls, and in divers of them with addition of entry. See 1 H. 8. Kelw. 154. Sir William Oldehalls case, 4 H. 7. 7. Lo. Ormonds case. Rot. Parl. 11 H. 4. nu. 42. Rich. de Hastings case, and Rot. Parl. 14 E. 4. nu. 4. Sir Joh. Fortescues case, attainted of treason in 1 E. 4. &c.

And the reason wherefore the king may by his charter pardon the execution, and restore the party or his heirs to the lands forfeited by the attainder, and remaining in the crown is, for that no person hath thereby any prejudice; but to make * restitution of his blood he cannot do it, but by act of parliament, because it should be to the prejudice of others.

In cartis benigna facienda est interpretatio, in foundationibus domuum religiosarum, hospitalium, et aliorum operum charitatis benignior, in testamentis magis benigna, in restitutionibus benignissima. * For it is holden in our books, that in restitutions the king himself hath no favour, nor his prerogative any exemption, but the party restored is favoured.

^b king H. 3. was intituled, &c. to the lands of William de Albo Monasterio by his attainder, and granted the same to Robert de Mares and his heirs, *donec eas reddiderit rectis hæredibus per voluntatem suam, vel per pacem.* And albeit at the making of this grant William de Albo Monasterio (being dead) could have in respect of the attainder and corruption of blood no right heir; yet because it was to make restitution, it had a most benigne interpretation.

^c William Lo. Zouche of Mortimer and Elianor his wife prayed to be restored to their land of Glannor and Morgannon in Wales, the mannor of Haveley in the county of Worcester, the mannor of Teukesbury in the county of Gloucester, being the inheritance of the said Elianor: who by the extort means of Roger late earle of March, were inforced to passe the same to the king by fine, in consideration of ten thousand pounds the king restored them thereto as in their former estate.

* Henry Courtney marquisse of Exeter and earl of Devon, having issue Edward Courtney, his only sonne, was attainted of high treason by the course of the common law in anno 31 H. 8. and in the same year was also attainted by act of parliament. Queen Mary by her letters patents bearing date 18th Sept. anno 1. regni sui granted the mannors of P and O, &c. in the county of Devon, &c. to the

the said Edward Courtney and his heirs: and afterwards 5 *Octobris* in the same year, at a parliament then holden, the said Edward and his heires were from thenceforth by authority of that act restored and inabled only in blood, as well as sonne and heir of the said lord marquisse his father, as to all and every other collaterall and lineall ancestor and ancestors of the said Edward. And that the severall attainders against the said lord marquisse for the attainder of the said lord marquisse be not in any wise prejudiciall or hurtfull to the said Edward or his heirs for the corruption of the blood only of the said Edward, but that the severall attainders and either of them be against him and his heirs for the corruption of blood only, utterly void. Provided always that the said act, ne any thing therein contained, should not in any wise extend to give any benefit or advantage to the said Edward, ne to his heirs, to demand, claime, or challenge any honors, castles, &c. ne any other hereditaments whatsoever whereunto H. 8. and E. 6. or either of them was entitled, or ought to have and enjoy by reason of the said several attainders of the said late lord marquisse, or of either of them. Edward Courtney died seised of the said mannors without issue, 18 Septemb. annis 3 and 4 Ph. & Mar. and Reinold Mohun, Alexander Arundell, John Vivian the younger, John Trelawny Esq. and Margaret Buller widow, were his collateral cousins and heirs: and whether the said restitution extended to the heirs collaterall of the said Edward, was by the queens commandment referred to the consideration of the two chief justices Popham and Anderson, Peryam chief baron, and to Egerton attorny, and to the solicitor generall. And it was resolved, that by reason of the attainder of the lord marquisse, if there had been no act of restitution, the heirs collaterall of the said Edward could not have inherited to the said Edward, in respect of the corruption of the blood wrought by the said attainder only: hereupon it was objected, that when it was enacted by the said act of restitution, that the said Edward and his heirs should be restored and inabled in blood only as sonne and heir to his said father, as all his ancestors lineall and collaterall, that the said restitution extended only to his heirs lineall, for other heirs he could not have as long as the said attainders of the marquisse stood in force, and the words of the act of restitution to Edward and his heirs, might be satisfied with the heirs lineall. And upon due consideration had of the case, it was (*una voce*) resolved by them all, that corruption of blood is a distinct penalty inflicted by law; and that the said act of restitution did extend to the heirs collaterall of the said Edward, (having no heirs lineall) as to the cleering and restoring of the blood, and avoiding of the corruption thereof: and that it had been sufficient if the act had restored and enabled him in blood only as heir to his father, thereby he and his heirs, as well collaterall as lineall, might make their descent or resort from the marquisse (for there was the stop and corruption) and from all other the ancestors of the said Edward, lineall or collaterall, and *ex abundanti* the other clause also is added, for the more manifestation hereof.

Mic. 35 & 36 El.

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Margaret Plantagenet was daughter to George duke of Clarence attainted of high treason by act of parliament 17 E. 4. and sister of Edward earl of Warwick, only sonne of the said George, and Isabel eldest daughter of Richard Nevil earle of Warwick and Salisbury: which

Statute de 5 H. 8.
not in print.

14 R. 2. nu. 36.

^a Rot. par.
18 E. 1. nu. 11.
of Liberties.

Stanf. pl. cor.
fo. 165, 166,
167. 186. 66.

105. 107.

F. N. B. 66. a.

^b 21 H. 8. cap.
11. 22 E. 3.
cor. 460.

Stanf. 167. a. b.

Lib. 5. fo. 110.

Lib. 6. fo. 80.

F. N. B. 66. a.

8 E. 2. tit. For-
feiture 34.

3 E. 3. cor. 365.

Vid. 40 E. 3.

42. lib. 5. fo. 110.

Hoftons case.

^c 8 H. 6. cap. 9.

See the second

part of the Instit.

cap. 8. H. 6.

cap. 9.

^d 31 Eliz. cap. 11.

Vide 4 Marizæ,

^e Dier 141.

21 Jac. cap. 15.

By the statute of

8 H. 6. cap. 9.

which Edward was attainted of high treason in *anno* 15 H. 7. before John Earle of Oxford then being high steward of England. The said Margaret was by act of parliament *anno* 5 H. 8. restored to the style, state, name, title, honour, and dignity of the countesse of Salisbury, (she was the last of the surname of Plantagenet) which act is very well penned, and worthy the reading for many respects, and the preamble thereof, *inter alia*.

Bills of restitution may begin in the parliament, either in the house of commons, or in the lords house.

^a There be also other kinds of restitutions to be treated of amongst the pleas of the crown, as restitution of goods upon an appeal, whereof you shall reade in Stanford with this addition. Vide lib. 5. fo. 110. a. 21 E. 4. 10.

^b And by the statute of 21 H. 8. cap. 11. restitution is to be granted upon an indictment, &c. For by the common law the party should not be restored to his goods upon an indictment (because it is the suit of the king) albeit the enquest found that the party had made fresh suit. But restitution was to be made upon an appeal which is the suit of the party.

See Stanford also fo. 167. a. b. whereunto you may adde Lib. 5. fo. 110. a. & Lib. 6. fo. 80. where you shall finde, that though this statute of 21 H. 8. speak only of the party robbed, yet his executors are within the statute, and so are his administrators. For it is a beneficial law, and giveth a more speedy remedy to the party robbed, &c. then the common law gave by way of appeale, and therefore ought to be construed beneficially.

Vide the Register, 68. b. that in some cases when the king ought *ex merito justitiæ* to make restitution to the party: yet for the honour of the king the writ saith, *Sine dilatione, restituas de gratia nostra speciali*, which derogate nothing from the right of the subject, when right is accompanied with grace.

Lastly, there are other lawes concerning restitutions of another kind. ^c As by the statute of 8 H. 6. restitution is to be made, when he that hath any estate of inheritance or freehold is disseised by forcible entry or forcible deteyner. ^d By the statute of 31 Eliz. there shall be no restitution by the statute of 8 H. 6. upon an indictment of forcible entry or forcible deteyner, where the defendant hath been three whole years together before the day of such indictment ^e in quiet possession, and his estate not ended, according to the true meaning of a proviso in the said statute of 8 H. 6. as it is declared by the said act of 31 Elizabeth.

By the statute of 21 Jac. regis, such judges, justices, or justice, as are enabled to give restitution of possession unto tenants of any estate * of freehold, &c. shall by reason of this act of 21 Jac. have the like and the same authority upon indictment of such forcible entries or forcible with-holdings before them duly found, to give like possession unto tenant for years, tenant by copie of court roll, guardens by knights service, tenants by elegit, statute merchant, or by statute staple.

And for as much (as it hath been said) no restitution ought to be made where the defendant or party indicted in case of freehold hath been in possession by the space of three whole years, &c. they having the like and same authority in case of tenant for years, tenant by copie of court roll, and other the tenants above named, cannot

cannot give restitution or possession, where the party indicted hath been in quiet possession by the space of three whole years. *Nota*, this act of 21 Jac. extends not to a garden in foccage, nor to a garden or keeper of a park: neither (as some hold) doth it extend to him, that by a last will hath an interest in lands or tenements untill debts and legacies be paid, because certain tenants be particularly nominated, and this is *casus omissus*. But this being a beneficial law to restore him, that right hath, to his possession of lands, &c. whereof he was wrongfully by force dispossessed, or by force withholden, &c. and being in like case in equall mischief, others do hold, that this act extendeth to this case of such a devisee, &c. and so it is for a tenant for a year, or for an halfe, or three quarters of a year.

See the statute of 32 H. 8. cap. 3. where the particular tenant charged with more then the land is worth, may after his term expired hold over untill he be satisfied, &c. in equall case with such a devisee.

* *Nota*, there be divers presidents in the chancery for restitution by writ to be made after execution upon a statute staple.

Anno 25 H. 6. Execution was sued upon a statute staple, and for that no certificat of the statute, &c. appeared of record, the conu- for had a writ of *supersedeas* out of the chancery with restitution to be made; and the forme of this writ appeareth in a Register M. S. in the chancery.

In the case of Sir Robert Gardner in the time of Sir Thomas Bromley lord chancellor, after a *supersedeas* granted, execution was done upon a statute staple, whereupon a *supersedeas* was granted with restitution reciting the speciall matter.

There is another president in 33 Eliz. in the case of one Car- rant, (but there the writ recited no speciall cause, but *pro diversis causis et considerationibus*,) a *supersedeas* with restitution was awarded.

* Restitution of another kinde, whereof we remember no book case.

THE EPILOGUE.

THUS have we by the great goodnesse of Almighty God, *per varios casus, per tot discrimina rerum*, brought this work concerning high treason, and other pleas of the crowne, or criminall causes, and of pardons, and restitutions, to a conclusion: wherein (as we are verily perswaded) we have made it apparent from the lively voice of the lawes themselves, that no country in the Christian world have in criminall cases, of highest nature, laws of such expresse and defined certainty, and so equall between the king and all his subjects, as this famous kingdome of England hath, being rightly understood, and duly executed, to the great honour of the king, and of the laws, and the happy safety of all his loving and loyall subjects.

Now seeing *justitia est duplex, viz. severe puniens, et verè præveniens*; that is, justice severely punishing, whereof we have spoken, and truly

Justice divided.

The Epilogue.

truly preventing, or preventing justice, (*quæ adhuc desideratur*) for we have spoken onely of the former; wee will therefore at this place (for a conclusion) point at the other with a direction how it may be effected.

Regula.

*Sta, perlege,
plora.*

Seneca li. 1. De
Clem. cap. 24.
*Non minus prin-
cipi turpia sunt
multa supplicia,
quam medico mul-
ta funera.*

Regula.

*Non morbus ple-
risque, sed morbi
neglecti curatio
corpus interficit.*

* Deut. 15. 4.
*Non erit omnino
indigens & men-
dicus inter vos,
ut benedicat tibi
Dominus.*

*Otiosus nihil cogi-
tat nisi de ventre,
et venere.*

See before ca. of
Pardons fo. 236.

Psal. 58. 11.
*Misericordia do-
mini præveniet
me.* 1 Maccab.
6. 27. *Nisi præ-
veneris illis, ma-
jora quam bæc
facient et non po-
teris eos obtinere.* 3 & 4 E. 6. ca. 5. in the preamble. *Imprimis interest reipublicæ, ut pax in regno con-
servetur, & quæcunque paci adversentur, provide declinentur.* 1 Mar. cap. 12. 32 H. 8. ca. 9. See
the fourth part of the Institutes, fo. 312. b.

True it is, that we have found by wofull experience, that it is not frequent and often punishment that doth prevent like offences, *Melior est enim justitia verè præveniens, quam severè puniens*, agreeing with the rule of the physitian for the safety of the body, *Præstat cautela, quam medela*: and it is a certain rule, that *Videbis ea sæpe committi quæ sæpe vindicantur*; those offences are often committed, that are often punished: for the frequency of the punishment makes it so familiar as it is not feared. For example, what a lamentable case it is to see so many Christian men and women strangled on that cursed tree of the gallows, insomuch as if in a large field a man might see together all the Christians, that but in one year, throughout England, come to that untimely and ignominious death, if there were any spark of grace, or charity in him, it would make his heart to bleed for pity and compassion. (But here I leave to divines to inform the inward man, who being well informed, *verbo informante*, the outward man will be the easilier reformed, *virga reformante*.)

This preventing justice consisteth in three things. First, in the good education of youth, and that both by good instruction of them in the grounds of the true religion of Almighty God, and by learning some knowledge or trade in their tender years, so as there should not be an idle person, or a * begger, but that every childe, male or female, whose parents are poor, might at the age of seaven years earn their own living: for *ars fit quod à teneris primum conjungitur annis*: and this, for the time to come, would undoubtedly by preventing justice avoid idlenesse in all, (one of the foul and fatall channels that lead into *mare mortuum*) and by honest trades cause them to become good members in the common-wealth.

Secondly, in the execution of good laws: True it is that there be good laws already to punish idlenesse, but none of sufficient force or effect to set youth, or the idle on work.

Thirdly, that forasmuch as many doe offend in hope of pardon, that pardons be very rarely granted, for the reasons in the chapter of pardons expressed.

But the consideration of this preventing justice were worthy of the wisdom of a parliament, and in the mean time expert and wise men to make preparation for the same, as the text saith, *ut benedicat eis dominus*. Blessed shall he be that layeth the first stone of this building, more blessed that proceeds in it, most of all that finisheth it, to the glory of God, and the honour of our king and nation.

*Et pergrata Deus nobis hæc otia fecit,
Optimus est patriæ jura referre labor.*

Deo gloria, et gratia.

F I N I S.

A T A B L E

T O T H E

Third Part of the Institutes of the Laws of England.

Ability and Disability.

WHERE no man of full age shall be received in any Plea to disable himself. *fo. 215*

Abjuration and Sanctuary.

The description of it. *115*
 Sanctuary the ground of Abjuration. *ibid.*
 What kind of Abjuration remains at this day. *ibid.*
 In what cases a man may abjure, and in what not. *216, 217*
 The judgement in case of Abjuration, and what is implied in it. *217*
 Where a felon that escapes out of Prison may take Sanctuary. *ib.*
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